SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1138

HAROLD WEISBERG,

Petitioner,

v.

U. S. DEPARTMENT OF JUSTICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on October 24, 1973.

OPINIONS BELOW

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit issued a

decision on February 28, 1973. The opinion of the panel majority and a dissent are set forth herein as Appendix A. The panel opinion was later vacated, and the Court of Appeals sitting *en banc* issued a decision on October 24, 1973. The majority and a dissenting opinion of that decision, not yet reported, are set forth herein as Appendix B. The District Court, Sirica, Judge, issued no opinion and made no findings of fact.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was entered on October 24, 1973, and this petition for certiorari was filed within 90 days of that date. Petitioner's timely petition for rehearing *en banc* was denied on November 19, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Can an agency sustain its burden of justifying the non-disclosure of records under the "investigatory files" exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(7), without showing how disclosure of the records sought would harm the government's law enforcement functions or proceedings?

2. Does the "except clause" of exemption 7 entitle the public to disclosure of records which would be available to a private party in litigation?

3. Is it error to grant motion to dismiss or for summary judgment pursuant to exemption 7 where no law enforcement purpose is cited and the government's affidavit in

support of its motion fails to qualify for consideration under Federal Civil Rule 56(e)?

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> "(a)(3) . . . each agency on request for identifiable records . . . shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides . . . or in which the agency records are situated has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action . . .
>
> "(b) This section does not apply to matters that are . . .
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> . . .
>
> "(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section . . ."

STATEMENT OF THE CASE

This suit, brought under the Freedom of Information Act, 5 U.S.C. 552 ("the Act"), seeks to compel the Department of Justice ("the Department") to disclose the typed reports [1] of the results of certain spectrographic analyses made by the Federal Bureau of Investigation ("the FBI") in connection with the investigation into the assassination of President John F. Kennedy. [2] Only paraphrases of these reports were made available to members of the Warren Commission and used in the Commission's *Report*. These paraphrases and the testimony given at the Commission's hearings in regard to the spectrographic analyses revealed only that the bullet and bullet fragments examined "were similar in metallic composition." [3] Since spectrographic analysis is capable of determining that even bullets and bullet fragments which are "similar in metallic composition" are in fact different because they contain

[1] The Court of Appeals opinion repeatedly refers to the documents Weisberg seeks as "materials", an ambiguous term capable of covering both raw scientific data and the physical items on which the spectrographic tests were performed. Thus, the Court's footnote 16 (See Appendix B-16) states that Weisberg ". . . had sought to *test* the spectrographic analysis of *materials* . . ." (Emphasis added) This is not correct. Weisberg requested only the typed reports of the results of these spectrographic analyses.

[2] Some of the spectrographic analyses were made before the Warren Commission was established, as a result of President Johnson's request that the FBI make a "special investigation" into the assassination. Other spectrographic analyses were made by the FBI after the Commission was established.

[3] The FBI spectrographer who performed the analyses, John F. Gallagher, testified at the Commission's hearings, but not in regard to the spectrographic analyses. The FBI ballistics expert, Robert A. Frazier, *did* testify in regard to the spectrographic analyses, and this quote is from him. (Hearings before the Warren Commission, Vol. V, p. 74) Frazier testified, however, that he was not the spectrographer and was not familiar with the detail of the spectrographic reports.

incompatible kinds or amounts of trace elements, the testimony and paraphrases are meaningless.[4] Weisberg maintains that the disclosure of the reports he seeks would disprove the official theory of the assassination and show that the FBI deceived the Warren Commission and the public as to what the results did in fact show. Weisberg states that this is the real reason the Department is suppressing the spectrographic reports.[5]

Department officials having repeatedly denied his requests for disclosure of these reports, Weisberg brought suit against the Department on August 3, 1970. On October 6, 1970, the Department filed a motion to dismiss or for summary judgment. The statement of material facts attached to the Department's motion listed only two relevant facts: 1) Weisberg had requested disclosure of the spectrographic analyses; and 2) the Attorney General had denied the requests on the grounds that the documents sought were part of an investigatory file compiled for law enforcement purposes. The Department attached no affidavit or exhibits to its October 6 motion.

On October 16, 1970, Weisberg filed an answer contesting the Department's statement that these analyses were part of an investigatory file compiled for law enforcement purposes. Weisberg quoted FBI Director J. Edgar Hoover, who testified to the Commission that there was no federal jurisdiction to investigate the assassination, but that the President had a right to request the FBI to make "special

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[4] Spectrographic analysis is a well-known and non-secret scientific procedure.

[5] See affidavit of Weisberg attached to Appellant's Petition For A Rehearing *En Banc*.

investigations." Hoover testified that President Johnson did request that the FBI make a "special investigation" into the assassination, and it is from that request that the FBI's initial authority derived.[6] Because the FBI served as the investigative arm of the Warren Commission, Weisberg also quoted the foreword to the Commission's *Report:*

> The Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a fact finding agency committed to the ascertainment of truth. (*Report,* p. XIV)

Weisberg further stated that the spectrographic reports which he seeks *were not* in fact given to the Texas authorities who *did* have jurisdiction over the crime.[7]

Five court days before oral argument the Department filed a supplement to its motion to dismiss which consisted solely of an attached affidavit by FBI Agent Marion

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[6] The Department has not yet named a specific statute pursuant to which the spectrographic analyses were compiled, even though it was challenged to do so. The Court of Appeals nonetheless surmised a law enforcement purpose: collaboration with the Texas authorities. Weisberg disputes this.

[7] The Department has never contradicted this allegation and no hearing was held on it. The Department's own affidavit (See affidavit of FBI Agent Marion E. Williams, reprinted as Appendix C) would seem to support Weisberg, since its paragraph 4 declares that the file in question "is not disclosed by the (FBI) *to persons other than U.S. Government employees* on a 'need-to-know' basis." (Emphasis added)

E. Williams.[8] At oral argument for Weisberg contested the Williams affidavit.[9] Counsel challenged the competency of Williams to execute the affidavit[10] and asserted that some statements in the affidavit were not true and others were not possible. Counsel denied, for example, that disclosure of these scientific tests could lead to the exposure of confidential informants or reveal the names of innocent parties out-of-context. Even so, the District Court, ruling from the bench, granted the Department's motion to dismiss at the conclusion of oral argument.[11]

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[8] The xerox of a carbon copy of the Williams affidavit which was served on counsel for Weisberg was unsigned and undated. Counsel did not learn until November, 1973, that the Williams affidavit was sworn to on August 19, 1970. Apparently it was withheld for filing at the last possible moment as part of a successful attempt to prevent Weisberg from filing a written response to it.

[9] The *en banc* opinion states, in footnote 4, that Weisberg "chose not to counter the Department's affidavit . . ." That is true only if read to mean that Weisberg did not file a counter-affidavit or other written opposition. Had the affidavit been filed with the Department's October 6 motion, as it should have been, Weisberg certainly would have opposed it in writing.

[10] The spectrographic analyses were made by FBI Agent John F. Gallagher. Williams' affidavit does not state that he is a spectrographer or that he had any connection with these spectrographic reports or even the investigation into President Kennedy's assassination. Nor does the affidavit specify Williams' duties with the FBI.

[11] The District Court may have been influenced by the sudden declaration of counsel for the Department that ". . . the Attorney General of the United States has determined that it is not in the national interest to divulge these spectrographic analyses." Counsel did not substantiate this and Weisberg believes it to be false. In legislating the Act, Congress specifically proscribed "national interest" as a grounds for refusing disclosure of information.

Weisberg appealed to the United States Court of Appeals for the District of Columbia Circuit, which issued an opinion on February 28, 1973. The majority opinion, written by United States District Judge Frank Kaufman and concurred in by Chief Judge David Bazelon, focused on the harms claimed in the Williams affidavit:

> The conclusion that the disclosure Weisberg seeks will cause any of those harms is neither compelled nor readily apparent, and therefore does not satisfy the Department's burden of proving under 5 U.S.C. 552(b)(7), as the Department must, some basis for fearing such harm.

The case was remanded to the District Court for proceedings in accordance with the opinion.[12] The Department then filed a petition for rehearing and suggestion of rehearing *en banc*. The petition argued that Congress had intended to create a blanket exemption for investigatory files and cited *Environmental Protection Agency v. Mink*, 410 U. S. 73 (1973), in support of its positon that *in camera* inspection is "unwarranted" in exemption 7 cases. The petition also stated that:

> . . . the panel decision would open FBI files to disclosure after inspection by district judges who are not experts in law enforcement techniques and therefore not

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12 In its footnote 5, the panel majority noted: "Weisberg contends that certain parts of the Williams affidavit do not qualify for consideration under Federal Civil Rule 56. Those contentions, on remand, should, if Weisberg desires, be brought to the attention of the District Court." (See Appendix at A-9)

> equipped to determine whether certain information contained in the files might be harmful . . . to the FBI's law enforcement efforts.

On May 22, 1973, the Court of Appeals vacated the February 28, 1973, opinion and ordered the case "reconsidered" by the Court *en banc* without further argument. On June 7, 1973, the Court consolidated Weisberg's case with *Committee to Investigate Assassinations v. Department of Justice,* No. 71-1789, and ordered both cases reheard jointly. No answer in opposition to the petition for rehearing was requested by the Court.

The *en banc* opinion, issued October 24, 1973, reversed the panel majority, holding:

> We deem it demonstrated beyond peradventure that the Department's files: (1) were investigatory in nature; and (2) were compiled for law enforcement purposes. When that much shall have been established . . . such files are exempt from compelled disclosure.

Weisberg's timely petition for a second rehearing in light of several serious factual errors was denied.

REASONS FOR ISSUANCE OF THE WRIT

CONFLICT BETWEEN CIRCUITS

This decision marks the first time that any Court of Appeals has expanded the Freedom of Information Act's exemption 7 into a blanket exemption protecting all files which are allegedly: 1) investigatory in nature; and 2) compiled for law enforcement purposes, even though the agency has failed to show any conceivable harm which

might result from disclosure. As a result, this decision is in direct conflict with the decisions of the Court of Appeals for the Fourth Circuit in *Wellford v. Hardin,* 444 F.2d 21 (1971); the Court of Appeals for the Second Circuit in *Frankel v. Securities and Exchange Commission,* 460 F.2d 813, *cert. denied,* 409 U.S. 882 (1972); and the Court of Appeals for the Fifth Circuit in *Evans v. Department of Transportation,* 446 F.2d 821 (1971), *cert. denied,* 405 U.S. 918 (1972). This decision is also inconsistent with the treatment accorded exemption 7 in the District of Columbia Circuit's own prior decisions, especially *Bristol-Meyers Co. v. F.T.C.,* 424 F.2d 935 (1970), *cert. denied,* 400 U.S. 824 (1970), and *Getman v. N.L.R.B.,* 450 F.2d 670 (1971).

At issue is whether an agency can, by mere edict labelling, sustain its burden of demonstrating that the documents sought are entitled to protection under exemption 7 and thus forever withhold information from the public with a claim that it was collected in connection with a law enforcement action, even though no federal law was violated, no prosecution is contemplated, and disclosure would not harm the agency's legitimate law enforcement functions. Prior to this decision, all circuits had uniformly required that an agency meet its statutory burden by showing that disclosure might result in a harm which Congress had intended to protect against. In *Wellford* the plaintiff sought copies of all letters of warning issued since January 1, 1965, to any non-federally-inspected meat or poultry processor suspected of being engaged in interstate commerce, the name of each processor whose product had been detained, and information about the detention. The Fourth Circuit looked behind the "investigatory files" label and held that the documents were disclosable

because the policy behind the exemption was to "prevent premature discovery by a defendant in an enforcement proceeding" and "protect the government's case in court," whereas in *Wellford* the documents sought were already in the hands of the parties against whom the law was being enforced. *Wellford, supra,* at 23-24. Although the agency argued that exemption 7 had other purposes which prohibited access, such as protection against disclosure of the identity of informants and the revelation of investigative techniques, the Fourth Circuit found that those harms were not present in the case before it: "Because the contents of these records are known by these companies [against whom the law was being enforced], publication would not reveal secret investigative techniques." *Wellford, supra,* at 24. Thus, the agency failed to meet its burden because it could not show that some harm to the government's law enforcement functions or proceedings might result from disclosure. Similarly, in *Frankel* and *Evans,* the Second and Fifth Circuits denied disclosure only after finding that it might result in one of the harms exemption 7 was intended to prevent. In both cases there was possible jeopardy to the identity of confidential informants, and *Frankel* also involved possible harm to the government's case in court, since the agency there had not affirmatively decided that there would be no further law enforcement proceedings against those it had investigated.

In the instant case, the Department did not claim that release of the spectrographic reports would cause the government harm, [13] and none of the harms that exemption

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[13] The Williams affidavit (see Appendix C) does not claim that release of the spectrographic reports would cause the government harm. Read carefully, the affidavit claims only that the precedent set by the *Weisberg* case might lead to those harms in other cases.

7 is designed to protect against is possible because: 1) the spectrographic reports cannot reveal the identity of any informant; 2) spectrographic analysis is a well-known scientific procedure and not a secret investigative technique; and 3) there is no prospect of any law enforcement proceedings. It is therefore clear that the test applied in the Second, Fourth, and Fifth Circuits requires an entirely different result than was achieved in the instant case by the District of Columbia Circuit, where the government no longer need show any harm to its law enforcement functions or proceedings in order to keep its records secret. This Court should grant this petition for a writ of certiorari in order to resolve this conflict between circuirts.

IMPORTANCE OF THE CASE

This Court should grant the petition for a writ of certiorari because of the importance of the legal issue involved. In *Environmental Protection Agency v. Mink,* 410 U.S. 73 (1973), this Court gave the D. C. Circuit guidance on exemptions 1 and 5. This case presents a legal issue equally, if not more important to the viability of the Freedom of Information Act than the issues at stake in *Mink.* This case involves a decision by the District of Columbia Circuit which is fast becoming a landmark case, and, as such, it will have a particularly great impact on Freedom of Information Act litigation. Most agency records are located in Washington and more than a third of all lawsuits brought under the Act have been filed in the District. As a result, the D.C. Circuit has become the leading expositor of the Act. In addition, the importance of this decision is further enhanced by the fact that approximately 40% of all suits brought under the Act

involve the investigatory files exemption.[14] This case is recognized by the D.C. Circuit as its major decision on exemption 7. Petitioner is aware of at least two instances

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[14] This is admittedly a very rough figure. Petitioner's information, which is limited, indicates that the following cases all involve a claim of immunity from disclosure under exemption 7: *Aspin v. Department of Defense*, 348 F. Supp. 1081 (D.D.C. 1972), No. 72-2147 (D.C. Cir. Nov. 26, 1973); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967); *Bristol-Myers Co. v. FTC*, 284 F. Supp. 745 (D.D.C. 1968), 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824; *Center for National Policy Review on Race and Urban Issues v. Richardson*, Civ. No. 2177-71 (D.D.C.), No. 73-1090 (D.C. Cir.); *Clement Brothers Co. v. N.L.R.B.*, 282 F. Supp. 540 (N.D. Ga. 1968); 407 F.2d 1027 (5th Cir. 1968); *Cogswell v. FDA*, No. 51990-ACW (N.D. Calif. 1970); *Committee to Investigate Assassinations v. U.S. Department of Justice*, Civ. No. 3651-70 (D. D.C. 1970), No. 71-1829 (D.C. Cir. Oct. 24, 1973); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Calif. 1971); *Ditlow v. Volpe*, 362 F. Supp. 1320 (D.D.C. 1973), No. 73-1984 (D.C. Cir.); *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971); *Frankel v. SEC*, 336 F. Supp. 675 (S.D. N.Y. 1971), 460 F.2d 813 (2nd Cir. 1972), *cert. denied*, 409 U.S. 882 (1972); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971); *Holiday Magic, Inc. v. FTC*, Civ. No. 1878-72 (D.D.C.); *LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971); *Legal Aid Society of Almeda County v. Schultz*, 349 F. Supp. 771 (N.D. Calif. 1972); *Long v. IRS*, 339 F. Supp. 1266 (W.D. Wash. 1971); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972); *Nichols v. United States*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); *Philadelphia Newspapers, Inc. v. HUD*, 343 F. Supp. 1176 (E.D. Pa. 1972); *Rayner & Stonington, Inc. v. FDA*, Civ. No. 68-1995 (E.D. Pa. 1972); *Robertson v. Shaffer, et al.*, Civ. No. 1970-71 (D.D.C.); *Rural Housing Alliance v. Department of Agriculture*, Civ. No. 2460-72 (D.D.C.); *Smith v. Department of Justice*, Civ. No. 1840-72 (D.D.C.); *Stern v. Kleindienst*. Civ. No. 179-73 (D.D.C.); *Wecksler v. Schultz*, 324 F. Supp.

(continued)

in which the Court of Appeals has required parties with an exemption 7 case pending before it to submit memorandums "concerning the effect of *Weisberg.*" [15]

Resolution by the Supreme Court is all the more required because the Court of Appeals decision is based on an erroneous construction of exemption 7 which drastically curtails citizen access to government records. In effect, the Court of Appeals decision eviscerates the Act's provision for *de novo* review of agency determinations of nondisclosure. The role of the court is thus reduced to that of a rubber stamp, and the agency is virtually unlimited in what it can designate as "part of an investigatory file compiled for law enforcement purposes." [16] Under this decision, even if the plaintiff disputes an agency's

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[14] (continued) 1084 (D.D.C. 1971); *Weinstein v. Kleindienst,* Civ. No. 2278-72 (D.D.C.); *Weisberg v. Department of Justice,* Civ. No. 718-70 (D.D.C. 1970); *Weisberg v. Department of Justice,* Civ. No. 2301-70 (D.D.C.), Civ. No. 71-1026 (D.C. Cir. Oct. 24, 1973); *Weisberg v. General Services Administration, et al.,* Civ. No. 2549-70 (D.D.C.); *Weisberg v. General Services Administration,* Civ. No. 2052-73 (D.D.C.); *Wellford v. Hardin,* 315 F. Supp. 175 (D. Md. 1970), 444 F.2d 21 (4th Cir. 1971); *Wellford v. Hardin,* 315 F. Supp. 768 (D.D.C. 1970); *Williams v. IRS,* 345 F. Supp. 591 (D. Del. 1972), 479 F.2d 317 (3rd Cir. 1973).

[15] *Reuben B. Robertson, III, et al. v. John H. Shaffer, et al.,* No. 72-2186; and *Center For National Policy Review On Race And Urban Issues, et al. v. Casper W. Weinberger,* No. 73-1090. In both cases the date of the order requiring a memorandum on the effect of *Weisberg* is November 14, 1973.

[16] For example, in *Weisberg v. Department of Justice,* Civ. No. 718-70 (D.D.C.), plaintiff sought copies of the documents which were introduced in evidence at the extradition proceedings of James Earl Ray in London. After first denying that it had the documents, (continued)

conclusory designation, he is not entitled to an evidentiary hearing on his contentions.[17] If the court so chooses, it can simply accept the assertions contained in the government's pleadings or affidavit, which may be not only conclusory, but even false.[18] Another practical effect of the Court of Appeals decision is to shift the burden of justifying the nondisclosure of information from the government, where the Act expressly places it, to the plaintiff, who now must affirmatively show that the exemption does not apply. Yet the very nature of most requests for disclosure of information makes it nigh impossible for a plaintiff to meet that burden,[19] especially where no hearing is held.

The legislative history of exemption 7 is contrary to the result achieved by the Court of Appeals. The Freedom of Information Act was enacted because the previous information law, old section 3 of the Administrative Procedure Act

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16 (continued) the Department of Justice then claimed these public court documents were "part of an investigatory file compiled for law enforcement purposes." Plaintiff was awarded summary judgment. Some of the documents thus obtained constitute exculpatory evidence important to Ray's defense. However, the same result would not obtain under the new *Weisberg* decision for which petitioner now seeks certiorari.

17 In the instant case, Weisberg did dispute the government claim that spectrographic analyses were "part of an investigatory file compiled for law enforcement purposes," but the district court, ruling from the bench, granted the Department's motion to dismiss at the conclusion of the oral argument.

18 In the instant case Weisberg maintains that virtually all of the assertions in the Williams affidavit are conclusory, and some are also false.

19 For a discussion of why, see *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

of 1946, had become a withholding rather than a disclosure statute. Congress intended that the specific categories of exemptions in the new Act would be more narrowly construed than in old section 3. (See 112 *Cong. Rec.* 13647, June 20, 1966.) Yet the legislative history of old section 3 shows that *even the 1946 Act did not contemplate a blanket exemption* for investigatory files. On the contrary, the exemption for investigatory files in the 1946 Act, even if vague, was nevertheless intended to be limited. Thus, the report of the Judiciary Committee on the 1946 Act stated:

> The introductory clause states the only general exceptions. The first . . . excepts matters requiring secrecy in the public interest . . . It would include confidential operations in any agency, such as *some* of the investigating or prosecuting functions of the Secret Service or the Federal Bureau of Investigation, *but no other functions or operations in those or other agencies.* (Emphasis added. Quoted by Senator Edward Long, 110 *Cong. Rec.* 17088, July 28, 1964)

Rather than construing exemption 7 narrowly, as Congress had intended, the Court of Appeals decision in effect treats exemption 7 in the same manner that this Court treated exemption 1 in *Mink, supra.* Yet in *Mink* this Court expressly noted that the unique nature of exemption 1 sets it apart from the Act's other exemptions. With respect to exemption 5, much closer in wording and legislative history to exemption 7 than either is to exemption 1, this court in *Mink* required a flexible approach, including the possibility of *in camera* inspection by the district

court. Petitioner finds no support in *Mink* for the blanket approach which the Court of Appeals has taken with respect to exemption 7.

The Court of Appeals also cites *Mink* in rejecting Weisberg's claim that he is entitled to the spectrographic analyses under the "except clause" of exemption 7 because Lee Harvey Oswald would have had a legal right to them had he been brought to trial. In footnote 15 of its opinion, the Court said:

> This appellant does not come within the definition of "party." The import of this language was discussed in *EPA v. Mink*, 410 U.S. at 86, indeed the Court would have allowed access only to such materials as "a private party could discover in litigation with the agency." The short answer to appellant's claim . . . is that he does not come within the terms of the Act. He was not engaged in litigation with an agency, and neither was Oswald. (See Appendix at B-15)

The Court of Appeals seems to be confused here. First, the exemption 7 except clause is worded somewhat differently than is the exemption 5 except clause, reading, "except to the extent available by law to a party other than an agency." Thus the question of whether or not Oswald or Weisberg have engaged in litigation with an agency is entirely irrelevant. Secondly, the Court of Appeals seems to have misinterpreted this Court's construction of the exemption 5 except clause. In the passage referred to, this Court said:

> By its terms . . . Exemption 5 creates an exemption for such documents only insofar as

> they "would not be available by law to a party . . . in litigation with the agency." *This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency.* (Emphasis added. *Mink, supra,* at 86)

Thus, the access afforded by the exemption 5 clause is to be determined by rough analogy to abstract rights, the general rules governing discovery in litigation between a private party and an agency, and does not, as the Court of Appeals holds, require a concrete case. Weisberg contends that the general concept of the except clause is the same for both exemptions, and that, consequently, the decision of this Court in *Mink* with regard to the exemption 5 except clause is authority for granting Weisberg access to the documents he seeks.

DEPARTMENT'S MOTION IMPROPERLY GRANTED

There were only two uncontested material facts before the District Court: 1) Weisberg had requested disclosure of the spectrographic analyses; 2) the Attorney General had denied disclosure of these documents, citing exemption 7. *The Government cited no law enforcement statute or proceeding,* state, local, or federal, *pursuant to which the spectrographic reports were in fact compiled.* Weisberg contends that this defect alone made it improper for the District Court to grant summary judgment.

Nor could the District Court properly grant the Department's motion to dismiss. Weisberg's complaint stated a valid claim of relief, there were disputed issues of fact, and Federal Civil Rule 12(b) requires that where matters outside

the pleading are presented to and not excluded by the court, a motion to dismiss must be treated as a motion for summary judgment.

Five court days before oral argument, the Department filed a supplement to its motion to dismiss or for summary judgment. This supplemental motion consisted entirely of an attached affidavit which does not qualify for consideration under Federal Civil Rule 56(e), which requires that affidavits in support of a motion for summary judgment must be made on personal knowledge, set forth facts such as would be admissible in evidence, and show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit. Weisberg contends that the Department's affidavit does not meet any of these qualifications. In addition, parts of the Department's affidavit consisted of conclusions of law. As one Court of Appeals has held, ". . . affidavits which contain mere conclusions of law or restatements of allegations of the pleadings are not sufficient to support a motion for summary judgment." *Welling v. Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir. 1943).

Weisberg presents the failure of the Department's affidavit to comply with Rule 56(e) as a reason for granting certiorari because it is obvious that plaintiffs in a Freedom of Information Act suit have virtually no chance of winning a trial by affidavits if the government is not made to comply with this Rule. In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), petition for *cert.* filed January 14, 1974 (No. 73-1107), the Court of Appeals for the District of Columbia discussed the problem plaintiffs have in countering the government's conclusory and "obfuscatory" affidavits. In order to prevent the government from shifting the burden of proof to the plaintiff in Freedom of Information

Act suits, the court directed sweeping changes in the government's method of responding to requests for the disclosure of information. The instant case requires a less sweeping solution than the one ordered *Vaughn:* the government must not be allowed to support a motion for summary judgment with a conclusory affidavit which does not qualify for consideration under Rule 56(e).

CONCLUSION

This Court should grant this petition for a writ of certiorari because this decision is in direct conflict with the interpretation which three other Circuits have given exemption 7 of the Freedom of Information Act. Only a decision by this Court can clear up the resulting confusion.

Freedom of Information Act cases are usually of great importance because the availability of information deeply affects First Amendment rights, thereby determining whether our people will have the informed judgment necessary for self-government. This decision of the Court of Appeals severely limits the information available to the people. Contrary to the clear intent of Congress, the decision of the Court of Appeals in effect turns the Act from a disclosure into a withholding statute, thus repeating the tragic history of the 1946 Act. The implications of this decision are particularly important because it comes at a time when citizens everywhere are concluding that secrecy in government has fostered unresponsive and sometimes even corrupt officials. As former Chief Justice Earl Warren recently remarked in discussing the Freedom of Information Act:

It would be difficult to name a more efficient ally of corruption than secrecy. Corruption is never flaunted to the world. In Government it is invariably practiced through secrecy. That secrecy is to be found in every level of Government from city halls to the White House and the Hill, and if anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of Government. (*Cong. Rec.*, December 18, 1973)

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1026

HAROLD WEISBERG, APPELLANT

v.

U. S. DEPARTMENT OF JUSTICE

Appeal from the United States District Court
for the District of Columbia

Decided February 28, 1973

Bernard Fensterwald, Jr., with whom *James H. Lesar* was on the brief, for appellant.

Alan S. Rosenthal, Attorney, Department of Justice, for appellee. *L. Patrick Gray, III*, Assistant Attorney General at the time the brief was filed, *Thomas A. Flannery*, United States Attorney at the time the brief was filed, *Walter H. Fleischer* and *Barbara L. Herwig*, Attorneys, Department of Justice, were on the brief for appellee.

Before BAZELON, *Chief Judge*, DANAHER, *Senior Circuit*

Judge, and KAUFMAN,* *United States District Judge* for the District of Maryland.

Opinion for the Court filed by KAUFMAN, District Judge.

Dissenting opinion by DANAHER, Senior Circuit Judge at p. 14.

KAUFMAN, *District Judge*: After unsuccessfully seeking on several occasions to obtain administrative disclosure, Harold Weisberg[1] brought this action to compel the disclosure under 5 U.S.C. § 552(a)(3), popularly known as the Freedom of Information Act, by the Department of Justice (the Department) of the following spectrographic analyses and other items (hereinafter referred to as the "records") compiled by the F.B.I. in connection with that agency's investigation for the Warren Commission[2] into the assassination of President Kennedy:

> Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally.

The Department moved in the alternative to dismiss or for summary judgment on the ground that the records sought were investigatory files compiled for law enforcement purposes and were thus exempt from disclosure under 5

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] Weisberg alleges that he is a professional writer who has published a number of books dealing with political assassinations and is researching the subject. In the motion context in which this case was decided below, all of plaintiff's allegations are considered as established for purposes of this appeal.

[2] The Warren Commission was established pursuant to Executive Order 11130, November 29, 1963 (28 F.R. 12789, Dec. 3, 1963) to "ascertain, evaluate, and report upon the facts relating to the assassination of the late President Ken-

U.S.C. § 552(b)(7).[3] In support of its summary judgment motion, the Department filed the following affidavit by F.B.I. Special Agent Marion E. Williams:

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nedy and the subsequent violent death of the man charged with the assassination." The purposes of the Commission were to "examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me [President Lyndon B. Johnson] its findings and conclusions."

[3] 5 U.S.C. § 552(b)(7) provides that the disclosure provisions of 5 U.S.C. § 552(a)(3) do not apply to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." That latter exception is not applicable herein since Weisberg is not entitled to the information he seeks as a party to any action other than the within suit. *See* Bristol-Myers Company v. F.T.C., 424 F.2d 935, 939 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); Cooney v. Sun Shipbuilding & Drydock Company, 288 F. Supp. 708, 711, 712 (E.D. Pa. (1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593, 594 (D. P.R. 1967). *See also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), hereinafter cited as House Report. Whether the word "party", as used in 5 U.S.C. § 552(b)(7), includes someone other than Weisberg and thus someone other than the particular party seeking the information, raises a question (*cf.* DAVIS, ADMINISTRATIVE LAW TREATISE, 1970 Supp., §§ 3A.21, 3A.23, pp. 157-58, 165) which this court need not resolve herein because the record does not indicate that any other person has received or is entitled to receive under any law other than the Freedom of Information Act, or under any discovery rule, the information Weisberg seeks herein. If this information had been disclosed to a "party", need for further secrecy would seem substantially diminished. However, this is not that case.

Weisberg specifically seeks disclosure under 5 U.S.C. § 552

1. I am [an] official of the FBI Laboratory and as such I have official access to FBI records.

2. I have reviewed the FBI Laboratory examinations

(a) (3) which provides that except for agency records (which exception is not relevant in this case),

> . . . each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available *to any person.* On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case *the court shall determine the matter de novo* and *the burden is on the agency to sustain its action.* In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. [Emphasis supplied.]

In Nichols v. United States, 460 F.2d 671 (10th Cir. 1970), the Tenth Circuit affirmed the District Court's grant of summary judgment against a plaintiff in a suit instituted under the Freedom of Information Act seeking to compel the disclosure or submission for analysis of certain items relating to the assassination of President Kennedy (at 672 n.1). In *Nichols*, the governmental agencies involved were the General Services Administration (GSA), the National Archives and Record Service, and the Department of the Navy (Navy). The District Court (325 F. Supp. 130, 135, 136, 137 (D. Kan. 1971)) held that certain items were not "records" for purposes of Section 552 and thus were not

referred to in the suit entitled "Harold Weisberg v. Department of Justice USDC D.C., Civil Action No. 2301-70," and more specifically, the spectro-

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subject to disclosure under that Section. The District Court also concluded that certain of the items had either been donated by an authorized representative of the Estate of John F. Kennedy or acquired, subject to restrictions on access, which restrictions prohibited the desired examination and inspection. Thus, those donated and acquired items were exempted from disclosure under Section 552(b)(3) either by virtue of 44 U.S.C. §§ 2107, 2108(c) which authorizes the Administrator of GSA to accept for deposit papers, documents, and other historical materials of a President of the United States subject to the restrictions imposed by the donors as to their availability and use, or by virtue of P.L. 89-318, 79 Stat. 1185. That law gives the Attorney General authority for one year from the date of its enactment, November 2, 1965, to acquire certain items of evidence considered by the Warren Commission, and provides that all right, title, and interest in those items acquired by the Attorney General vest in the United States. Section 4 of Public Law 89-318 provides that all items acquired by the Attorney General "be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as he may prescribe."

5 U.S.C. § 552(b)(3) provides that the disclosure provisions of 5 U.S.C. § 552(a)(3) do not apply to matters "specifically exempted from disclosure by statute."

Additionally, the District Court found that the following item sought by plaintiff from the Navy, although properly a record within the meaning of Section 552 was not in the Navy's custody or control, and thus as to it the District Court granted summary judgment in favor of the Navy;

> The written diagnosis of findings made by the Bethesda Hospital radiologist from his X-ray study of X-ray films taken at the autopsy of the late Prestident. [At 137.]

On appeal, the Tenth Circuit affirmed the District Court's conclusions that the donated and acquired items sought were exempted from disclosure, and that the summary judgment

graphic examinations of bullet fragments recovered during the investigation of the assassination of President John F. Kennedy and referred to in paragraphs 6 and 17 of the complaint in said case.

3. These spectrographic examinations were conducted for law enforcement purposes as a part of the FBI investigation into the assassination. The details of these examinations constitute a part of the investigative file, which was compiled for law enforcement purposes and is maintained by the Federal Bureau of Investigation concerning the investigation of the assassination of President John F. Kennedy.
4. The investigative file referred to in paragraph "3" above was compiled solely for the official use of U.S. Government personnel. This file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees on a "need-to-know" basis.
5. The release of raw data from such investigative files to any and all persons who request them would

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record was sufficient to establish that none of the items requested from the Navy were in the Navy's custody or control and that therefore summary judgment in favor of the Navy was proper. The Tenth Circuit found it unnecessary to decide the question of whether the District Court properly concluded that certain of the items sought were not "records" under Section 552 because all of those items whether records or not, were exempt from disclosure.

Unlike *Nichols*, in this case there is no allegation or indication by the Government that the "analyses" Weisberg seeks were acquired pursuant to any statute or regulation which exempts them from disclosure. Furthermore, Weisberg does not seek disclosure of any tangible evidence of the type requested in *Nichols*. Weisberg seeks disclosure only of spectrographic analyses which are similar in kind to the "diagnosis" sought from the Navy in *Nichols* and which the District Court held to be a record within the meaning of Section 552. 325 F. Supp. at 137.

> seriously interfere with the efficient operation of the FBI and with the proper discharge of its important law enforcement responsibilities, since it would open the door to unwarranted invasions of privacy and other possible abuses by persons seeking information from such files. It could lead, for example, to exposure of confidential informants; the disclosure out of context of the names of innocent parties, such as witnesses; the disclosure of the names of suspected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage. Acquiescence to the Plaintiff's request in instant litigation would create a highly dangerous precedent in this regard.

Weisberg did not submit any counteraffidavit or any other Rule 56 documents. After hearing oral argument from both parties, the District Court, without setting forth its reasons, granted the Department's motion to dismiss.

In *Bristol-Myers Company v. F.T.C.*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), Chief Judge Bazelon, in reversing the grant of a motion to dismiss the plaintiff's Freedom of Information Act complaint, and in commenting upon the 5 U.S.C. § 552(b)(7) exemption, wrote:

> • • • [T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable.

In the within case, no criminal or civil action relating to the death of President Kennedy is pending nor is it indicated by the Government that any such future action is

contemplated by anyone. Nor is Weisberg the subject of any investigation. He simply asks for information which he alleges he is entitled to have made available to him under 5 U.S.C. § 552(a)(3). The language of Section 552, supported abundantly by the legislative history of the Freedom of Information Act,[4] places the burden on the Government to show why non-revelation should be permitted, and requires that exemptions from disclosure be narrowly construed and that ambiguities be resolved in favor of disclosure. *See generally Getman v. N.L.R.B.*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *Bristol-Myers Company v. F.T.C., supra* at 938-40; *M. A. Schapiro & Co. v. Securities & Exchange Comm'n*, 339 F. Supp. 467, 469, 470 (D. D.C. 1972); *cf. LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971) (Friendly, J.). In *Wellford v. Hardin, supra* at 25, Judge Butzner commented that 5 U.S.C. § 552(c) provides that the Act "'does not authorize withholding of information or limit the availability of records to the public, except as specifically stated'" and noted Professor Davis' emphasis upon "'[t]he pull of the word "specifically". . . .'" K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 783 (1967). It follows that the exemption set forth in 5 U.S.C. § 552(b)(7) applies only when the withholding agency sustains the burden of proving that disclosure of the files sought is likely to create a concrete prospect of serious harm to its law enforcement efficiency either in a named case or otherwise. *See Bristol-Myers Company v. F.T.C., supra* at 939, 940.

The Court below granted the Government's motion to dismiss, not its motion for summary judgment. Thus, it seemingly accorded no weight to the affidavit of Agent

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[4] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), hereinafter cited as Senate Report. House Report at 5.

Williams.[5] But even if that affidavit is given full consideration, it is a document which is most general and conclusory and which in no way explains *how* the disclosure of the records sought is likely to reveal the identity of confidential informants, or to subject persons to blackmail, or to disclosure the names of criminal suspects, or in any other way to hinder F.B.I. efficiency.[6] The conclusions that the disclosure Weisberg seeks will cause any of those harms is neither compelled nor readily apparent, and therefore does not satisfy the Department's burden of proving under 5 U.S.C. § 552(b)(7), as the Department must, some basis for fearing such harm.[7] Neither the

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[5] Weisberg contends that certain parts of the Williams' affidavit do not qualify for consideration under Federal Civil Rule 56. Those contentions, on remand, should, if Weisberg desires, be brought to the attention of the District Court.

[6] An F.B.I. investigatory file may generally relate to organized or other crime and may not have been originally intended for use in the prosecution of any named individuals, or, even if so originally intended, may no longer be intended for such use. The data contained in such a file may, however, require the protection of secrecy so as not to dry up future sources of information or to pose a danger to the persons who supplied the information or to prevent invasion of personal privacy. 5 U.S.C. § 552(b)(7) would appear sufficiently flexible to include within its protection such an investigatory file when and if such protection is required. Frankel v. Securities & Exchange Commission, 460 F.2d 813 (2d Cir. 1972); Evans v. Department of Transportation, 446 F.2d 821, 823-24 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Calif. 1971). In such instances, *in camera* inspection by the District Court might be appropriate. See discussion *infra* at p. 11, n.10.

[7] "The burden of proof is placed upon the agency which is the only party able to justify the withholding." House Report at 9. *And see* the specific wording of 5 U.S.C. § 552(a)(3) set forth in n.3, *supra*. While it may be that the introductory

F.B.I. nor any other governmental agency can shoulder that burden by simply stating as a matter of fact that it has so done, or by simply labelling as investigatory a file

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words of Section 552(b) make the burden of proof provisions of Section 552(a)(3) inapplicable in determining whether the Section 552(b) exceptions apply (*but see* the contrary approach taken in all opinions, majority, concurring and dissenting, in Environmental Protection Agency, et al. v. Mink, et al., —— U.S. —— (January 22, 1973), and the Ninth Circuit's seeming assumption to the contrary in Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970)), that contention in no way compels any different conclusions than those expressed in this opinion. The underlying philosophy of Section 552 favors disclosure. *See* Senate Report at 3. Section 552(c) provides that Section 552 "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." *See* the discussion *supra* at pp. 7-8 re Wellford v. Hardin, *supra*. The thrust of Section 552(c) is that exceptions from the disclosure provisions of Section 552 are to be carefully construed. *See* House Report at 11; Senate Report at 10. To place the burden of proof on the plaintiff to prove the nonapplicability of a Section 552(b) exception when the Government as a rule has knowledge of nearly all the facts relevant to such an exception would be contrary to the disclosure philosophy of all of Section 552 and specifically of Section 552(c). Moreover, placing the burden of proof on the plaintiff would also seemingly run contrary to the underlying philosophy set forth in the House Report which, in explaining why the burden of proof was placed on the agency to justify the withholding of information in Section 552(a)(3), stated (at 9): "A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action." *See also* Senate Report at 8. That same reasoning would seem equally applicable in determining the relationship among 552(a)(3), 552(b)(7) and 552(c).

In Environmental Protection Agency, et al. v. Mink, et al., *supra*, Mr. Justice White, in the majority opinion, held that under 5 U.S.C. § 552(b)(1), exempting "matters that are (1) specifically required by Executive order to be kept secret in

which it neither intends to use, nor contemplates making use of, in the future for law enforcement purposes, at least not without establishing the nature of some harm which is likely to result from public disclosure of the file. Something more than mere edict or labelling is required if

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the interest of the national defense or foreign policy", once an Executive order to that effect issues, the exemption applies without the Government being required to do more. In other words, the Government's burden is met by simply showing that an Executive order issued and that national defense or foreign policy was involved. Earlier, in 1970, in Epstein v. Resor, *supra*, Judge Merrill wrote (at 932-33):

> The appeal presents a question as to the scope of judicial review. Section 552(a)(3) provides that "the court shall determine the matter de novo and the burden is on the agency to sustain its action."
>
> Appellees insist, however, that this subsection does not apply here. They point to § 552(b) which states that "[t]his section does not apply to matters" in nine enumerated categories. Appellees contend that agency determination that the material sought falls within one of the nine exempted categories takes the case out of subsection (a)(3) and precludes the broad judicial review provided by that subsection. They assert that we are here faced with an agency determination that the (b)(1) exemption applies.
>
> Unquestionably the Act is awkwardly drawn. However, in view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that it was intended to foreclose an (a)(3) judicial review of the circumstances of exemption. Rather it would seem that (b) was intended to specify the bases for withholding under (a)(3) and that judicial review de novo with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist. * * *
>
> This being so, appellant argues, the District Court should have taken the file for a determination *in camera* as to whether, under (b)(1) and the applicable executive standards, this file should, after twenty-four years,

the Freedom of Information Act is to accomplish its "primary purpose, i.e., 'to increase the citizen's access to government records.'"[8] This would be just as true in a

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still be classified as "top secret" in the interests of the national defense or foreign policy.

Here we part company with appellant.

Section (b)(1) is couched in terms significantly different from the other exemptions. Under the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review. * * * Under (b)(1) this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question. [Footnote omitted; citations omitted.]

In this case no Executive order, and no matter of national defense or foreign policy, is asserted to be involved. Further, it is to be noted that in remanding in connection with the application of 5 U.S.C. § 552(b)(5) exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", Mr. Justice White in the *Environmental Protection Agency* case placed the burden of showing entitlement to the (b)(5) exemption upon the Government.

[8] Getman v. N.L.R.B., 450 F.2d *supra* at 672, in which Judge Wright quoted from Judge Bazelon's opinion in *Bristol-Myers*. *See* Philadelphia Newspapers, Inc. v. Department of H & U.D., 343 F. Supp. 1176, 1180 (E.D. Pa. 1972); Cowles Communications, Inc. v. Department of Justice, *supra* at 727.

"For the great majority of different records, the public as a whole has a right to know *what its Government is doing*" (emphasis supplied), Senate Report at 5-6. And *see also* the "conclusion" in House Report at 12: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic so-

case in which the public appetite for further information has been fully met as it is in this case in which the disclosure sought relates to a national tragedy concerning which discussion and debate continue.

This case is hereby remanded to the District Court for further proceedings in accordance with this opinion. If on remand the Government is fearful that in order to satisfy its burden of proof, it will of necessity disclose information, the revellation of which will cause the type of harm 5 U.S.C. § 552(b)(7) seeks to avoid, the District Court will always have the right, in its "informed discretion, good sense and fairness"[9] to conduct the proceedings in such a way, either by *in camera* inspection or otherwise, as to give the Government the opportunity to meet its burden and at the same time to preserve such secrecy as is warranted.[10]

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ciety in the United States is the fact that such a political truism needs repeating. * * *"

[9] Alderman v. United States, 394 U.S. 165, 185 (1969).

[10] *See* M.A. Schapiro & Co. v. Securities & Exchange Comm'sn, 339 F. Supp. *supra* at 469, in which the Court viewed certain documents *in camera*, and ordered information therein to be disclosed *See also* Evans v. Department of Transportation, 446 F.2d *supra* at 823; Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. *supra* at 727; *cf.* Fisher v. Renegotiation Board, —— F.2d —— (D.C. Cir. November 10, 1972); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970). The *in camera* inspection technique would appear to accord with a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." House Report at 6. *But cf.* Frankel v. Securities & Exchange Commission, *supra*, at n.6 herein. *And see* Judge Oakes' dissenting opinion therein and his references to *in camera* inspections in connection with 5 U.S.C. § 552(b)(4) and (5). Frankel v. Securities & Exchange Commission,

DANAHER, *Senior Circuit Judge*, dissenting:

Quite in keeping with our common purpose correctly to decide the cases presented to us is the desire to achieve unanimity whenever possible, and I had hoped to gain acceptance for my approach. That I now find myself differing from my esteemed colleagues causes me concern. To paraphrase Jefferson, a "decent respect" for the opinions of others requires that I declare the reasons for my doubts concerning the disposition they propose.

This appellant had alleged that he is a professional writer who had published books[1] dealing with political assassinations. Appended to his complaint were exhibits reflecting his correspondence over a four-year period with the late Director J. Edgar Hoover of the Federal Bureau of Investigation, former Attorney General Ramsey Clark, former Attorney General John Mitchell and the [present] Attorney General Richard Kleindienst. Also set out were their replies either to the appellant or to his counsel.

Among the mentioned exhibits attached to appellant's complaint was Exhibit D, appellant's letter of May 16, 1970, addressed to then Deputy Attorney General Kleindienst, from which I quote:

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460 F.2d *supra* at 818. And most importantly *see* Mr. Justice White's discussion of the use of the *in camera* technique in Environmental Protection Agency, et al. v. Mink, et al., *supra*, and his warning that that technique is only one of a number of possible tools available to the District Court for use in determining whether the withholding of documents sought under the Freedom of Information Act is appropriate.

* Sitting by designation pursuant to 28 U.S.C. § 292(c) (1970).

[1] At argument in the district court appellant's counsel represented that appellant had published "four books on the Kennedy assassination" with a fifth on the way.

With regard to the spectographic analyses, if you are not aware of it, . . . I think you should know that if it does not agree in the most minute detail with the interpretation put upon it by the Warren Commission, their Report is a fiction.

• • • • •

With regard to the photograph identified as FBI Exhibit 60 requested in my letter of April 22, 1970, addressed to the Attorney General, I provide this information and request:

> "This is a picture of President Kennedy's shirt. The shirt itself is withheld from examination and study and any taking of pictures of it is prevented on the seemingly proper ground that neither the government nor his estate want any undignified or sensational use of it. I have explored this thoroughly with the National Archives and the representative of the estate, verbally and in extensive correspondence. However, there is no use to which the available pictures can be put that is of any other nature, for they show nothing but his blood."

The appellant's complaint in paragraph 6 had alleged that after the assassination of President Kennedy on November 22, 1963, the Federal Bureau of Investigation had spectrographically analyzed and compared the following items:

a) the bullet found on the stretcher of either President Kennedy or Governor John Connally of Texas (Identified as Exhibit 399 of the President's Commission on the Assassination of President Kennedy, hereafter referred to as the Warren Commission);

b) bullet fragment from front seat cushion of the President's limousine;

c) bullet fragment from beside front seat;

d) metal fragments from the President's head;

e) metal fragment from the arm of Governor Connally;

f) three metal fragments recovered from rear floor board carpet of limousine;

g) metal scrapings from inside surface of windshield of limousine; and

h) metal scrapings from curb in Dealey Plaza which was struck by bullet or fragment.

Appellant's complaint in paragraph 17 made further reference to Exhibit D, the letter of May 16, 1970, above mentioned, alleging that accompanying that letter was a completed form D.J. 118 ("Request for Access to Official Records Under 5 U.S.C. 552(a) and 28 CFR Part 16") describing the records sought as follows:

> "Spectographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally. See my letter of 5/16/70.
>
> (See Exhibit D appended hereto.)"

The Department of Justice, relying upon 5 U.S.C. § 552(b)(7), rejected the appellant's request explaining

> the work notes and raw analysis data on which the results of the spectrographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosure as investigatory files compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7) . . . .[3]

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[3] 5 U.S.C. § 552(b)(7) as here pertinent reads:

> (b) This section shall not apply to matters that are—
>
> * * * * *
>
> (7) investigatory files compiled for law enforcement purposes . . . .

Both the appellant and the Department were well aware that the *results* of the spectrographic tests had been submitted to the Warren Commission and that the appellant wanted, not "results" but the analyses themselves.

President Kennedy was pronounced dead at 1:00 p.m. on Friday, November 22, 1963. That day, at 2:38 p.m., Lyndon B. Johnson was sworn in as the thirty-sixth President of the United States and immediately by plane left Texas for Washington.

Director Hoover testified before the Warren Commission that

> When President Johnson returned to Washington he communicated with me within the first 24 hours and asked the Bureau to pick up the investigation of the assassination because as you are aware, there is no federal jurisdiction for such an investigation. It is not a Federal crime to kill or attack the President or Vice President, or any of the continuity of officers who would succeed to the presidency.
>
> However, the President has a right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made. I immediately assigned a special force headed by the special agent in charge at Dallas, Texas, to initiate the investigation, and to get all details and facts concerning it, which we obtained, and then prepared a report which we submitted to the Attorney General for transmission to the President. Hearings before the Warren Commission, Vol. 5, page 98.

Clearly the President contemplated collaboration with Texas authorities by representatives of the Secret Service and of the Federal Bureau of Investigation, looking to the early apprehension and ultimately the conviction of the perpetrator of the crime.

Speedily it was developed that the rifle from which the assassin's bullets had been fired had been shipped to one Lee Harvey Oswald. Oswald was placed under arrest and charged with the commission of the crime. Some forty-eight hours later while in the custody of the Dallas Police Department, Oswald was fatally shot by one Jack

Ruby in full view of a horrified national television audience.

Thereafter, President Johnson on November 30, 1963, issued Executive Order No. 11130, 28 Fed. Reg. 12789 (1963), appointing a Special Commission under the Chairmanship of the Chief Justice of the United States. (Hereinafter, the Warren Commission, or Commission). The Commission was directed

> to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities; to make such further investigation as the Commission finds desirable; to evaluate all the facts and circumstances surrounding such assassination, including the subsequent violent death of the man charged with the assassination, and to report to me [President Johnson] its findings and conclusions.
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> • • • • • • • • • • •
>
> All Executive departments and agencies are directed to furnish the Commission[4] with such facilities, services and cooperation as it may request from time to time.
>
> Lyndon B. Johnson

The President's Commission on the Assassination of President John F. Kennedy in the Foreword of its Report, xii, states

> The scope and detail of the investigative effort by the Federal and State agencies are suggested in part by statistics from the Federal Bureau of Investigation and the Secret Service. Immediately after the assassination more than 80 additional FBI personnel were transferred to the Dallas office on a temporary basis to assist in the investigation. Beginning No-

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[4] Public Law 88-202, approved December 13, 1963 authorized the Commission to require the attendance of witnesses and the production of evidence.

vember 22, 1963, the Federal Bureau of Investigation conducted approximately 25,000 interviews and reinterviews of persons having information of possible relevance to the investigation and by September 11, 1964, submitted over 2,300 reports totaling approximately 25,400 pages to the Commission. During the same period the Secret Service conducted approximately 1,550 interviews and submitted 800 reports totaling some 4,600 pages.

The appellant had argued that the materials he sought could not have been part of investigatory files "compiled for law enforcement purposes" since in 1963 there had been no statute denouncing as a federal crime, the assassination of a president.[5] He thus contended that he "is entitled to the sought material as a matter of law and not as a matter of grace."

It is my view that (1) the district judge correctly perceived that the materials here sought were part of an investigatory file which had been compiled for law enforcement purposes, and (2) such materials were specifically exempted from disclosure by the express language of the statute. (See note 3, *supra.*)

I respectfully suggest that the documents I have set forth demonstrate beyond peradventure that an investigation had been inaugurated by direction of President Johnson, that it went forward immediately under Director Hoover and attained a scope and wealth of detail by the Federal Bureau of Investigation and other agencies, unequalled within the knowledge of most of us. Thus, there became available an investigatory file which uniquely had been compiled for law enforcement purposes, and the evidence so collected was specifically exempted from disclosure as had been contemplated by Congress. That exemption applies to this very minute and comports fully with the Congressional intent.

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[5] *But see* 18 U.S.C. § 1751, P.L. 89-141, August 28, 1965.

Senate Report 813, 89th Cong., 1st Sess., 3 (1965) to accompany the proposed legislation explained:

> It is also necessary for the very operation of our government to allow it to keep confidential certain material such as the investigatory files of the Federal Bureau of Investigation,

as noted in *Frankel* v. *Securities and Exchange Commission*, 460 F.2d 813, 817 (2 Cir. 1972); *Evans* v. *Department of Transportation of United States*, 446 F.2d 821, 824, note 1, (5 Cir. 1971), *cert. denied* 405 U.S. 918 (1972); cf. *N.L.R.B.* v. *Clement Brothers Co.*, 407 F.2d 1027 (5 Cir. 1969), and *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726 (D.N.D. Calif. 1971). See also *EPA* v. *MINK*, —— U.S. ——, note 6, (Jan. 22, 1973).

To me, it is unthinkable that the criminal investigatory files of the Federal Bureau of Investigation are to be thrown open to the rummaging writers of some television crime series, or, *at the instance of some "party" off the street*, that a court may by order impose a burden upon the Department of Justice to justify to some judge the reasons for Executive action involving Government policy in the area here involved.

In this respect I deem it fundamental that the Attorney General in myriad situations must exercise the discretion conferred upon him by law. He must decide whether to prosecute or not. He must decide whom to prosecute. He must decide when to prosecute. He must evaluate the evidence necessary to an informed judgment. We ourselves have made it clear:

> It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General (citing cases).[6]

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[6] Powell v. Katzenbach, 123 U.S.App.D.C. 250, 359 F.2d 234 (1965), *cert. denied*, 384 U.S. 906 (1966). For various instances presenting discretionary problems, *see* Pugach v. Klein, 193 F.Supp. 630, 634-635 (S.D.N.Y. 1961).

As I read the background[7] for the legislation here under consideration, I perceive no evidence of a Congressional intent that the files of a Dillinger, or of criminal hundreds like him, are to be subject to a judicial order for disclosure. In this area we may note that for the fiscal year 1972, the FBI developed more than 345,000 items of criminal intelligence which were disseminated to other Federal, state and local agencies engaged in law enforcement. More than 495,000 examinations of evidence were conducted by the FBI laboratory to be submitted to law enforcement agencies. Organized crime investigations ranged throughout the nation, for example, involving interstate gambling and interstate transportation of securities obtained by fraud, not to mention other federal crimes. Tens of thousands of items of criminal intelligence were otherwise developed by the FBI.[8] Can it be that where the Attorney General decides no prosecution is to be had, the Bureau files are to be subject to court review?

Nor do we have a semblance of a genuine issue of material fact, for the record before us is clear as a bell and there is no need for remand.[9]

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[7] *See*, in part, references in footnote 1, Getman v. National Labor Relations Board, 146 U.S. App. D.C. 209, 450 F.2d 670 (1970).

[8] Annual Report of the Federal Bureau of Investigation for 1972.

I dare say neither the Attorney General nor the Federal Bureau of Investigation must meet any burden of proof respecting non-disclosure for the simple reason that Congress itself has exempted such files. I believe there is no basis whatever for a remand in this case.

[9] As Judge Fahy wrote in Irons v. Schuyler, —— U.S.App. D.C. ——, 465 F.2d 608, 613 (1972), *cert. denied*, —— U.S. ——, (Dec. 18, 1972):

"Assuming that the court granted the motion to dis-

I suggest in any event that 5 U.S.C. § 552(a) has no bearing whatever on our problem, and as to the situation proffered by the complaint, subsection (a)(3) has conferred no jurisdiction on the district court. I am satisfied that the district judge was right, and perceiving that the materials here sought were included among investigatory files compiled for law enforcement purposes, his ruling on this phase was governed by Section 552(b)(7).

II

One might reasonably suppose that not even a dedicated sensation-seeker would have claimed the right to compel the Kennedy Estate or the Kennedy family to turn over for inspection portions of the body [10] of the late President, or his personal property or the clothing he had worn November 22, 1963. Yet the public-mindedness of the family was revealed in The New York Times of January 6, 1968 when for the first time the text of a letter was disclosed. That letter, dated October 29, 1966, set forth an

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miss on the basis of insufficiency of the allegations of the complaint, we think the court was justified in doing so. It appears, however, that the court probably relied upon data not limited to the allegations properly considered on a motion to dismiss. If so, this too was justified because the motion to dismiss was joined with a motion for summary judgment. The action of the court may fairly be construed as a grant of the latter motion as warranted by the law as applied to the facts which present no material factual issue precluding the grant of summary judgment."

See Carter v. Stanton, 405 U.S. 669 (1972), and Donofrio v. Camp, —— U.S.App.D.C. ——, —— F.2d —— (Oct. 18, 1972).

[10] The New York Times of August 27, 1972 reported in some detail that one said to be a pathologist was seeking access to a portion of the murdered President's brain.

agreement [11] between Lawson B. Knott, Jr., Administrator of General Services, and Burke Marshall, Esq., acting on behalf of the Executors of the Estate of John F. Kennedy.

The text of the letter agreement as reported by the Times reads in part:

> The family of the late President John F. Kennedy shares the concern of the Government of the United States that the personal effects of the late President which were gathered as evidence by the President's Commission on the Assassination of President Kennedy, as well as certain other materials relating to the assassination, should be deposited, safeguarded and preserved in the Archives of the United States as materials of historical importance. The family desires to prevent the undignified or sensational use of these materials (such as public display) or any other use which would tend in any way to dishonor the memory of the late President or cause unnecessary grief or suffering to the members of his family and those closely associated with him. We know the Government respects these desires.

The agreement further provided for amendment, modification or termination only by written consent of the Administrator and the Kennedy family, with authority reposed in the Administrator to impose such other restrictions on access to and inspection of the materials as he might deem necessary and appropriate.[12]

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[11] *See* 44 U.S.C. § 2107 which provides that the Administrator of General Services, in the public interest, may accept for deposit historical materials of a President or former President of the United States "subject to restrictions agreeable to the Administrator as to their use."

Additionally, 44 U.S.C. § 2108(c) provides that accepted historical materials are subject to restrictions stated in writing by the donors, including a restriction that they be kept in a Presidential archival depository.

[12] Further detailed conditions and restrictions relating to

Meanwhile, Congress had not been idle. In support of H.R. 9545, which became Public Law 89-318, approved November 2, 1965, the House considered its H. Report 813. Then pending legislation was described as "vital and needed promptly." [13]

The Senate Report No. 851 filed in due course by the Judiciary Committee noted that the "national interest" "requires" that the Attorney General be in position to determine that any of the critical exhibits considered by the Warren Commission be acquired and be permanently retained by the United States.

Such references are here pertinent as we read *Nichols* v. *United States*, 325 F. Supp. 130, 135, 136 (D. Kan. 1971), where the district judge lists the assassination material

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access to the transferred materials may be seen from the letter itself, Pub. Doc. Exhibit A, Warren Commission for Assassination, National Archives Record Group 272.

See, generally, regulations for the use of donated historical materials, 41 CFR Part 105-61, with provision that public use of such materials is subject to all conditions specified by the donor or by the Archivist of the United States (41 CFR 105-61.202). More specifically, the Archivist has published guidelines for review of materials submitted to the President's Commission on the Assassination of President Kennedy. *See* National Archives Record Group 272.

[13] One private party had previously sought possession of the assassination weapon utilized by Oswald. *See* United States v. One 6.5 mm. Mannlicher-Carcano Military R. 250 F. Supp. 410 (N.D.Tex. 1966), with its detailed stipulation of facts as to the Oswald weapons and with references to the Senate and House Reports concerning P.L. 89-318. *And see* the same case on appeal where the Fifth Circuit in 1969, 406 F.2d 1170, took note that the Attorney General on November 1, 1966 had published his determination that items considered by the Warren Commission should be acquired by the United States. *See* Section 2(a) of P.L. 89-318.

the plaintiff had sought including the Oswald rifle, certain ammunition, the coat and the shirt worn by the President at the time of the assassination, a bullet found at the hospital, empty cartridge cases, metal fragments from the wrist of Governor Connally, metal fragments from the brain of the late President, and various other items comparable to or including the sort of material our appellant had here demanded.[14] On appeal, *Nichols* v. *United States*, 460 F.2d 671, the Tenth Circuit affirmed the summary judgment which had been entered in the district court. Chief Judge Lewis concluded that the requested items fell within the purview of 5 U.S.C. § 552(b)(3) and constituted matter which had been "specifically exempted from disclosure by statute." Relying upon P.L. 89-318, *supra*, the court deemed the rules and regulations of the Archivist to have been clearly within the scope of the Congressional grant of authority.

Before the Supreme Court, the Solicitor General relied upon the opinion of the Court of Appeals. On brief[15] he stated

> The court noted that the materials requested were acquired either under the authority of Public Law 89-318, 79 Stat. 1185, relating to the acquisition of Warren Commission exhibits, or under 44 U.S.C. 2107, 2108(c) . . . .

The Supreme Court denied certiorari, —— U.S. ——, (October 24, 1972, 41 U.S.L.W. 3223).

That is good enough for me, and I see within the ambit of the concern of the various courts which considered *Nichols*, ample precedent for our affirmance of the action of Chief Judge Sirica in the instant case.

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[14] *See* our n. 2, *supra*.

[15] *See* brief for the United States in Nichols v. United States, Supreme Court No. 72-210, October Term, 1972.

The opening paragraph of the Commission's Report to the President read, in part:

> The assassination of John Fitzgerald Kennedy on November 22, 1963, was a cruel and shocking act of violence directed against a man, a family, a nation, and against all mankind. A young and vigorous leader whose years of public and private life stretched before him was the victim of the fourth Presidential assassination in the history of a country dedicated to the concepts of reasoned argument and peaceful political change.[16]

I suggest that whether under 5 U.S.C. § 552(b)(7), Part I hereof, or under § 552(b)(3), specifically exempting from disclosure by statute the materials appellant had sought, Part II hereof, the law, as to the issue before us, forfends against this appellant's proposed further inquiry into the assassination of President Kennedy.

REQUIESCAT IN PACE.

I would affirm the judgment of the district court.

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[16] Report of the President's Commission, Chapter I, page 1.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1026

HAROLD WEISBERG, APPELLANT

v.

U. S. DEPARTMENT OF JUSTICE

On Rehearing *En Banc*

Decided October 24, 1973

Bernard Fensterwald, Jr., with whom *James H. Lesar* was on the brief, for appellants.

Walter H. Fleischer, Attorney, Department of Justice, with whom Assistant Attorney General *L. Patrick Gray, III*, at the time the brief was filed, *Thomas A. Flannery*, United States Attorney at the time the brief was filed, *Harold H. Titus, Jr.*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice, were on the brief, for appellee. *Alan S. Rosenthal*, Attorney, Department of Justice, also entered an appearance for appellee.

Before: BAZELON, *Chief Judge*, DANAHER,* *Senior Circuit Judge*, WRIGHT, MCGOWAN, TAMM, LEVENTHAL,

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* No. 71-1829, Committee to Investigate Assassinations v. U.S. Department of Justice was argued together with the above entitled case. *Senior Circuit Judge* Danaher did not participate in the consideration or disposition of 71-1829 and an opinion in that case will be forthcoming.

ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the Court filed by *Senior Circuit Judge* DANAHER.

Dissenting opinion filed by *Chief Judge* BAZELON at p. 17.

DANAHER, *Senior Circuit Judge:* Relying upon 5 U.S.C. § 552(a)(3) of the Freedom of Information Act, appellant in the district court sought to compel disclosure of certain materials [1] compiled by the Federal Bureau of Investigation following the assassination of the late President Kennedy. Appellant argued that he is a professional writer who has published four books treating of the Kennedy assassination. The Department of Justice moved that the complaint be dismissed or, alternatively, for summary judgment, predicating its position

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[1] The appellant's complaint in paragraph 6 had alleged that after the assassination of President Kennedy on November 22, 1963, the Federal Bureau of Investigation had spectrographically analyzed and compared the following items:

a) the bullet found on the stretcher of either President Kennedy or Governor John Connally of Texas (Identified as Exhibit 399 of the President's Commission on the Assassination of President Kennedy, hereafter referred to as the Warren Commission);

b) bullet fragment from front seat cushion of the President's limousine;

c) bullet fragment from beside front seat;

d) metal fragments from the President's head;

e) metal fragment from the arm of Governor Connally;

f) three metal fragments recovered from rear floor board carpet of limousine;

g) metal scrapings from inside surface of windshield of limousine; and

h) metal scrapings from curb in Dealey Plaza which was struck by bullet or fragment.

upon Section 552(b)(7) of the Act which, as here pertinent, provides:

(b) This section shall not apply to matters that are

* * * * *

(7) investigatory files compiled for law enforcement purposes . . . .

The district court without opinion granted the Department's motion to dismiss.[2] We are satisfied that the record before us clearly demonstrates the desired materials[3] were part of the investigatory files compiled by the FBI for law enforcement purposes, and, as such, are exempt from the disclosure sought to be compelled. Accordingly, we affirm.[4]

I.

President Kennedy was pronounced dead at 1:00 p.m. on Friday, November 22, 1963. That day, at 2:38 p.m., Lyndon B. Johnson was sworn in as the thirty-sixth

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[2] Following argument of Weisberg's appeal, the respective opinions of a divided court were vacated when we entered our order for rehearing *en banc*.

[3] Prior to the institution of this action the Attorney General had denied appellant's application for administrative relief wherein he described as "records" the following:

> "Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally.

[4] The appellant chose not to counter the Department's affidavit filed in support of its Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, or alternatively, for summary judgment. No material issue of fact was presented in any event. *See* Irons v. Schuyler, 151 U.S. App. D.C. 23, 28, 465 F.2d 608, 613, *cert. denied*, 409 U.S. 1076 (1972); *cf.* Carter v. Stanton, 405 U.S. 669 at 671 (1972); *and see* Nichols v. United States, 460 F.2d 671, 675 (10 Cir.), *cert. denied*, 409 U.S. 966 (1972).

President of the United States and immediately by plane left Texas for Washington.

Director Hoover testified before the Warren Commission that

> When President Johnson returned to Washington he communicated with me within the first 24 hours and asked the Bureau to pick up the investigation of the assassination because as you are aware, there is no federal jurisdiction for such an investigation. It is not a Federal crime to kill or attack the President or Vice President, or any of the continuity of officers who would succeed to the presidency.

Appellant has argued on brief that the FBI materials could not have been compiled for law enforcement purposes since, in 1963 the State of Texas but not United States "had jurisdiction over the crime."[5] He thus contended that he was "entitled to the sought material as a matter of law and not as a matter of grace."

Clearly, in the day and time of it all, the President contemplated collaboration with Texas authorities by agents of the Secret Service and of the Federal Bureau of Investigation looking to the early apprehension and ultimately the conviction of whoever murdered President Kennedy. It was speedily developed that the rifle from which the assassin's bullets had been fired had been shipped to one Lee Harvey Oswald. The latter was placed under arrest and charged with the perpetration of the crime. Two days later, as an investigation of massive proportions got under way, Oswald, then in the custody of Dallas Police, was fatally shot by one Jack Ruby.

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[5] Congress by Pub.L. 89-141 approved August 28, 1965, 18 U.S.C. § 1751, prescribed penalties to apply in cases of assassination of a president and other identified officers and dealt with conspiracies to accomplish any such proscribed offense.

Director Hoover further testified before the Warren Commission [6] thus:

> However, the President has a right to request the Bureau to make special investigations, and in this instance he asked that this investigation be made. I immediately assigned a special force headed by the special agent in charge at Dallas, Texas, to initiate the investigation, and to get all details and facts concerning it, which we obtained, and then prepared a report which we submitted to the Attorney General for transmission to the President. [Hearings before the Warren Commission, Vol. 5, p. 98.]

To glean some understanding of the magnitude of the investigatory organization which was speedily activated, we may turn to the Foreword of the Warren Commission Report, xii, from which we quote:

> The scope and detail of the investigative effort by the Federal and State agencies are suggested in part by statistics from the Federal Bureau of Investigation and the Secret Service. Immediately after the assassination more than 80 additional FBI personnel were transferred to the Dallas office on a temporary basis to assist in the investigation. Beginning November 22, 1963, the Federal Bureau of Investigation conducted approximately 25,000 interviews and reinterviews of persons having information of possible rele-

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[6] By Executive Order No. 11130, 28 Fed. Reg. 12789 (1963), President Johnson appointed a Special Commission under the Chairmanship of Chief Justice Warren "to examine the evidence developed by the Federal Bureau of Investigation and any additional evidence that may hereafter come to light or be uncovered by federal or state authorities." Congress cooperated and passed Public Law 88-202, approved December 13, 1963, authorizing the Commission to require the attendance of witnesses and the production of evidence.

> vance to the investigation and by September 11, 1964, submitted over 2,300 reports totaling approximately 25,400 pages to the Commission. During the same period the Secret Service conducted approximately 1,550 interviews and submitted 800 reports totaling some 4,600 pages.

We deem it demonstrated beyond peradventure that the Department's files: (1) were investigatory in nature; and (2) were compiled for law enforcement purposes.[7] When that much shall have been established, as is so clearly the situation on this record, and the district judge shall so determine, such files are exempt from compelled disclosure.

II.

While the statute speaks for itself in the respect under consideration, we may note that the legislative history additionally explains:

> It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.[8]

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[7] We are not at this point concerned with the "except" clause of subsection (7) which protects the Department's files "except to the extent available by law to a party other than an agency." *See* the definition of "party" in 5 U.S.C. § 551(3) and note 15, *infra*.

[8] S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess., at 6 (1966). EPA v. Mink, 410 U.S. 73, 80, n.6 (1973), Frankel v. Securities and Exchange Commission, 460 F.2d 813, 817, (2 Cir.), *cert. denied*, 409 U.S. 882 (1972); *and see* Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D.Cal. 1971), (where *in-camera* inspection was directed only to ascertain whether or not there was an investigatory file compiled for law enforcement purposes). *And see* Evans v. Department of Transportation of United States, 446 F.2d

In slightly different context to be sure, Judge Hays analyzed the Congressional purpose thus:

> If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. *The agency's investigatory techniques and procedures would be revealed.* The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.[9] (Emphasis added).

There can be no question that 5 U.S.C. § 552 had as its principal purpose that there was to be disclosure to the public of the manner in which the Government conducts its business. Congress additionally was concerned with the dilemma in which the public finds itself when forced to "litigate with agencies on the basis of secret laws or incomplete information."[10] We have repeatedly

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821, 824, n.1, (5 Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) and N.L.R.B. v. Clement Brothers Co., 407 F.2d 1027 (5 Cir. 1969).

[9] Frankel v. Securities and Exchange Commission, *supra*, note 8, 460 F.2d at 818.

[10] Bannercraft Clothing Company, Inc. v. Renegotiation Board, U.S. App. D.C. , 466 F.2d 345, 352 (1972), *cert. granted*, 410 U.S. 907 (1973); *and see* American Mail Line Ltd. v. Gulick, 133 U.S. App. D.C. 382, 411 F.2d 696 (1969); *see also* Grumman Aircraft Engineering Corp. v. The Renegotiation Board, No. 71-1730 (D.C. Cir. July 3, 1973).

made evident our appreciation of the principle that generally disclosure, and not withholding, of information is called for, especially where there is an adversarial posture presented as in *Bristol-Myers Co.* v. *FTC*, 138 U.S. App. D.C. 22, 25, 424 F.2d 935, 938, *cert. denied*, 400 U.S. 824 (1970.)[11] But the remedy appropriately provided in § 552(a)(3) is not available in every situation, and as we have previously noted, § 552(b) is explicit that § 552 does not apply to matters that are specifically exempted.

We are not here speaking of trade secrets, or personnel and medical files, or patent information or internal revenue returns, or yet other material which, by statute (*see, e.g.*, 41 CFR § 105-60.604, 1972), had been specifically exempted from disclosure. We are not treating of geological information or matter required by Executive order to be kept secret. We are not discussing any problem except that of compelled disclosure of Federal Bureau of Investigation investigatory files * compiled

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[11] *And see*, generally, our discussion in Getman v. National Labor Relations Board, 146 U.S. App. D.C. 209, 218, 450 F.2d 670, 679-680 (1971); Sterling Drug, Inc. v. Federal Trade Commission, 146 U.S. App. D.C. 237, 244, 450 F.2d 698, 705 (1971); Soucie v. David, 145 U.S. App. D.C. 144, 154, 448 F.2d 1067, 1077 (1971); Irons v. Schuyler, 151 U.S. App. D.C. 23, 465 F.2d 608, *cert. denied*, 409 U.S. 1076 (1972); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 138 U.S. App. D.C. 147, 425 F.2d 578 (1970).

Nothing in the foregoing cases runs counter to the Supreme Court's treatment in EPA v. Mink, 410 U.S. 73 (1973).

* Attorney General Richardson, acting pursuant to Title 28 U.S.C. Section 509, by Order No. 528-73, July 11, 1973, 38 Fed. Reg. No. 136, 19029, [and see 5 U.S.C. § 301] has amended earlier regulations relating to materials exempted from compulsory disclosure under the Freedom of Information Act. "Possible releases that may be considered under this section are at the sole discretion of the Attorney General and of those persons to whom authority hereunder may be delegated." The Order provides for access to material within the De-

for law enforcement purposes. Certainly the answer does not depend upon what this appellant desires to accomplish if access be afforded. The Court has told us that the Act does not "by its terms, permit inquiry into particularized needs of the individual seeking the information." *EPA* v. *Mink*, 410 U.S. at 86. Against the background we have hereinbefore set out, we may appropriately turn, particularly as a frame of reference, to the correspondence between the appellant and the Department prior to the institution of this action.

This appellant, in his letter of May 16, 1970 attached as an exhibit to his complaint, submitted to the Department of Justice the following:

> With regard to the spectrographic analysis, if you are not aware of it, not then having been in your present position, I think you should know that if it does not agree in the most minute detail with the interpretation put upon it by the Warren Commission, their Report is a fiction.

Appellant then transmitted the Department's form entitled "Request For Access To Official Record Under 5 U.S.C. 552(a) and 28 CFR Part 16," describing the material set forth in our footnote 3, *supra*. A further exhibit attached to the appellant's complaint discloses that the Department under date of June 12, 1970, wrote:

> *Spectrographic Analyses:* You have asked for access to the spectrographic analyses conducted on certain bullet evidence involved in the assassination.
>
> I regret that I am unable to grant your request in that the work notes and raw analytical

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partment's investigatory files compiled for law enforcement purposes "that are more than fifteen years old" subject to certain deletions which include "(4) *Investigatory techniques and procedures.*" (Emphasis added) *Compare* text quoted *supra*, and identified in Frankel v. Securities and Exchange Commission, 460 F.2d at 817-818, n. 9, *supra*.

> data on which the results of the spectographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosure as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b)(7). The results of the spectrographic tests are adequately shown in the report of the Warren Commission where (Volume 5, pages 67, 69, 73 and 74) it is specifically set forth that the metal fragments were analyzed spectrographically and found to be similar in composition.

Our problem thus stems from what follows under the Freedom of Information Act after the Attorney General's exercise of the decisional process devolving upon him.

III.

The Department of Justice, headed by the Attorney General, 28 U.S.C. § 503, includes the Federal Bureau of Investigation, 28 U.S.C. § 531. The Attorney General is directly charged under 28 U.S.C. § 534 with the duty to acquire, collect, classify and preserve identification, criminal identification, crime and other records, and to exchange such records with and for the official use of authorized officials, not only of the federal government, but of the States and cities. So it was that the Bureau collaborated with the Dallas police.[12]

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[12] Such cooperation regularly follows as a matter of duty in aid of law enforcement, indeed the magnitude of the effort, scarcely realized, has been delineated in *Menard* v. *Mitchell*, 328 F. Supp. 718, 721-722 (D.D.C. 1971), following our remand in that case, 139 U.S. App. D.C. 113, 430 F.2d 486 (1970).

Cf. Public Law 88-245, the Appropriations Act of 1964, providing funds for the Federal Bureau of Investigation for the "protection of the person of the President of the United States; acquisition . . . and preservation of identification and

Further appreciation of the daily activity of the Bureau may be seen in its annual report for 1972. The FBI had developed more than 345,000 items of criminal intelligence which had been disseminated to other Federal, state and local agencies engaged in law enforcement. More than 495,000 examinations of evidence had been conducted by the FBI laboratory to be submitted to law enforcement agencies. Organized crime investigations had ranged throughout the nation. Discretion respecting disclosure of the records in such matters devolved upon the Attorney General by virtue of 28 U.S.C. § 534. Moreover, under subsection (b) thereof, the exchange of records so gathered may be "subject to cancellation if dissemination is made outside the receiving departments or related agencies," Congress provided. It may to some appear *unthinkable* that the criminal investigatory files of the Bureau of Investigation, compiled for law enforcement purposes, are to be thrown open to some "person" as defined in 5 U.S.C. § 551(2) who asserts entitlement in reliance upon § 552(a)(3). Yet our appellant claims his "right" as a matter of law since in November, 1963, it was not a federal crime to kill a President. We need only surmise the consequences to law enforcement if any "person," knowing full well that an investigation has been conducted, can ask some federal court to compel disclosure of the Bureau's files.

Obviously, the statutory scheme of organization, as above referred to, calls for the exercise of discretion *by* the Attorney General respecting execution of the duties devolving upon him, and through him, upon the Federal Bureau of Investigation. We have no doubt whatever

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other records and their exchange with, and for the official use of, the duly authorized officials . . . of States . . ., such exchange to be subject to cancellation if dissemination is made outside the receiving departments."

that Congress was fully alive to the problem where investigatory files of the FBI were involved.

Congress knows full well that in the first instance an Attorney General in myriad situations must exercise the discretion conferred upon him by law. He must evaluate the evidence necessary to an informed judgment. He must decide whether to prosecute or not. He must decide whom to prosecute. He must decide when to prosecute. Functions in this area belong to the Executive under the Constitution, Article II, Sections 1 and 3, and, as here, specifically to the Attorney General under 28 U.S.C. § 509. Consider problems such as we find were assessed in *Pugach* v. *Klein*, 193 F. Supp. 630, 634-635 (S.D.N.Y. 1961), and *Moses* v. *Kennedy*, 219 F. Supp. 762, 765 (1963), *aff'd sub nom.*, *Moses* v. *Katzenbach*, 119 U.S. App. D.C. 352, 342 F.2d 931 (1965). As Judge Wright there said

> . . . an investigation as to the adequacy or the execution of these laws is not a matter within the jurisdiction of the judicial branch of this Government.

And *see Newman* v. *United States*, 127 U.S. App. D.C. 263, 265, 382 F.2d 479, 481 (opinion by present Chief Justice Burger, 1967). The Attorney General's prosecutorial discretion is broad, indeed, and ordinarily at least, is not subject to judicial review. *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 380 (2 Cir. 1973); *Powell* v. *Katzenbach*, 123 U.S. App. D.C. 250, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); *Tuohy* v. *Ragen*, 340 U.S. 462, 467-469 (1951); cf. *Adams* v. *Richardson*, U.S. App. D.C. , F.2d (*en banc*, June 12, 1973); but we suggested that immunity respecting the exercise of discretion may well be unavailable were the Department to be under investigation by a court or grand jury when fraud or corruption might be involved, *Committee for*

Nuclear Responsibility, Inc. v. *Seaborg*, 149 U.S. App. D.C. 385, 391, 463 F.2d 788, 794, (1971). But this much is certain, (5 U.S.C. § 301 as part of Pub. L. 89-554, 80 Stat. 379), the Attorney General, like the heads of other Executive departments, was authorized to refuse disclosure under Exemption 7 if he could determine as here that the issue involved investigatory files compiled for law enforcement purposes.

IV

Congress surely realized that disclosure was not to be required in certain prescribed classifications. For example, section 552(b) provided that the section as a whole was not to apply to matters that are (3) "specifically exempted from disclosure by statute." *See*, as illustrative, the statutes identified in 41 CFR § 105-60.604 (1972).

Again, section 552(b)(1) exempted from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." That very language gave rise to an issue which this court first considered, followed by the Supreme Court's definitive pronouncements as to the steps to be taken respecting disclosure of materials coming within section 552(b)(5). Ruling that we misapplied that section,[13] the Court reversed, *EPA* v. *Mink*, 410 U.S. 73 (1973), observing at 82 after a review of the legislative history,

> Rather than some vague standard, the test was to be simply whether the President has determined by executive order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible

[13] Mink v. Environmental Protection Agency, U.S. App. D.C. , 464 F.2d 742 (1971).

> argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them.

Lest there be any doubt as to the Supreme Court's teaching respecting Exemption (b)(1), its opinion, 410 U.S. at 84, emphasized:

> What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen.

There was to be no room for challenge, no "balancing" function, no *in camera* inspection. Rather, upon the basis of the "showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1, and the duty of the District Court under Section 552 (a)(3) was therefore at an end." *EPA* v. *Mink*, 410 U.S. at 84.

In that very case, strikingly different treatment was prescribed even as to executive materials claimed to be immune from disclosure under Exemption 5. *EPA* v. *Mink*, 410 U.S. at 85 *et seq.* The applicability of Exemption 7 no less will turn ultimately upon a determination by the district court [14] that disclosure is not required —as in the instant case.

Granted that the Attorney General may designate certain investigatory files as having been compiled for law enforcement purposes, his *ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper. Where

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[14] Cf. Cowles Communications, Inc. v. Department of Justice, *supra*, n. 8. See generally the discussion in Vaughn v. Rosen, U.S. App. D.C. , F.2d (Aug. 20, 1973).

the district court can conclude that the Attorney General's designation and classification are correct, the Freedom of Information Act requires no more. Here the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were "investigatory files compiled for law enforcement purposes." When the District Judge made that determination, he correctly perceived that his duty in achieving the will of Congress under the Freedom of Information Act was at an end.[15]

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[15] This appellant also argued that if Oswald had lived and had been brought to trial, he would have had a legal right to the spectrographic analyses here in question, and accordingly Weisberg must be accorded an equal right. He based this claim upon so much of subsection (b)(7) as appears in the clause "except to the extent available by law to a party other than an agency." Aside from the fact that there was no such prosecution, Oswald's "right" would have been recognized only to the extent that the wanted material could have been "available by law," and then only to himself as a "party" as defined in § 551(3). This appellant does not come within the definition of "party." The import of this language was discussed in EPA v. Mink, 410 U.S. at 86, indeed the Court would have allowed public access only to such materials as "a private party could discover in litigation with the agency." The short answer to appellant's claim in this respect is that he does not come within the terms of the Act. He was not engaged in litigation with an agency, and neither was Oswald.

Thus he ruled that there was no claim upon which relief could be granted, that there was no issue as to any material fact, and that the Department was entitled to judgment as a matter of law.[16] The action was thereupon dismissed.

Affirmed.

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[16] *Cf.* Nichols v. United States, 460 F.2d 671 (10 Cir.), *cert. denied*, 409 U.S. 966 (1972).

Our appellant had sought to test the spectrographic analyses of materials (listed in our n. 3, *supra*) not unlike certain items listed in note 1 of Nichols, *supra*. There Nichols had sought to make his own scientific analysis of the described material, which the court found to be specifically exempted from disclosure by statute, pointing to § 552(b)(3). The opinion cited Pub. L. 89-318, 79 Stat. 1185, November 2, 1965, where the Attorney General acting in "the national interest" designated evidence considered by the Warren Commission to "be preserved." Such evidence pursuant to § 4 of that Act was to be placed under the jurisdiction of the Administrator of General Services for preservation under such rules and regulations as the Administrator might prescribe. (*See generally*, 41 CFR § 105-60.101, §§ 105-60.601, 60.602 and 60.604; and Vol. 11, Part 17, 23,002 Congressional Record, 89th Cong. 1st Sess., Sept. 7, 1965).

The court found—without more—that the rules and regulations are clearly within the grant of authority of Pub. L. 89-318, and that the materials sought by Nichols came within the exemption of § 552(b)(3).

[Special "Regulations Concerning Procedures for Reference Service on Warren Commission and Related Items of Evidence," National Archives Record Group 272, provide in subsection 5, in part, that materials which have been subjected to techniques of detailed scientific examination "will be withheld from researchers as a means of protecting them from possible physical damage or alteration and in order to preserve their evidentiary integrity in the event of any further official investigation of the assassination of President John F. Kennedy."]

BAZELON, *Chief Judge*, dissenting: In *Environmental Protection Agency v. Mink*,[1] Mr. Justice White, writing for a majority of the Court, reviewed the legislative history of one section of the Freedom of Information Act, that which exempts from disclosure "matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[2] On the basis of the legislative history and the explicit statutory language, the majority concluded that "Congress chose to follow the Executive's determinations in these matters . . . . Rather than follow some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret."[3]

In this case, appellant Weisberg seeks the following information:

> Spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally.

In response to Weisberg's request for this information, the Justice Department stated:

> . . . that the work notes and raw analytical data on which the results of the spectrographic tests are based are part of the investigative files of the FBI and are specifically exempted from public disclosures as investigatory files compiled for law enforcement purposes. 5 U.S.C. 552(b)(7). The results of the spectrographic tests are adequately shown in the report of the Warren Commission where (Volume 5, pages 67, 69, 73 and 74) it is specifically set forth that the metal fragments were analyzed spectrographically and found to be similar in composition.

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[1] 410 U.S. 73 (1973).

[2] 5 U.S.C. § 552(b)(1) (1970).

[3] 410 U.S. at 81-82.

Thus, we deal in this case, not with Section 552(b)(1), but with Section 552(b)(7). The latter provision exempts from disclosure "matters that are . . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." I have no doubt that, as Judge Danaher's majority opinion concludes, the information sought in this case is lodged in a file originally compiled for law enforcement purposes. I cannot, however, agree with the majority that this fact automatically brings the information within the ambit of Section 552(b)(7). There remains the question whether such information is to be considered as resting solely within an "investigative file" when the results of the spectrographic tests have been made public in the Warren Commission report and when there is no indication that the Government contemplates use of the information for law enforcement purposes.

The reasons that support my position are fully stated in Judge Frank Kaufman's[4] majority opinion for the panel that originally heard this case, an opinion in which I concurred and which was withdrawn when the case was ordered to be reheard *en banc*. I set forth here the central part of Judge Kaufman's opinion:[5]

> In *Bristol-Myers Company v. F.T.C.*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), Chief Judge Bazelon, in reversing the grant of a motion to dismiss the plaintiff's Freedom of Information Act complaint, and in commenting upon the 5 U.S.C. § 552(b)(7) exemption, wrote:
>
> * * * [T]he agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files

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[4] United States District Judge for the District of Maryland; Judge Kaufman sat in this case by designation pursuant to 28 U.S.C. § 292(d) (1970).

[5] The footnotes of Judge Kaufman's opinion have been renumbered.

with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable.

In the within case, no criminal or civil action relating to the death of President Kennedy is pending nor is it indicated by the Government that any such future action is contemplated by anyone. Nor is Weisberg the subject of any investigation. He simply asks for information which he alleges he is entitled to have made available to him under 5 U.S.C. § 552 (a) (3). The language of Section 552, supported abundantly by the legislative history of the Freedom of Information Act,[6] places the burden on the Government to show why non-revelation should be permitted, and requires that exemptions from disclosure be narrowly construed and that ambiguities be resolved in favor of disclosure. *See generally Getman v. N.L.R.B.*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *Bristol-Myers Company v. F.T.C., supra* at 938-40; *M. A. Shapiro & Co. v. Securities & Exchange Comm'n*, 339 F. Supp. 467, 469, 470 (D. D.C. 1972); *cf. LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971) (Friendly, J.). In *Wellford v. Hardin, supra* at 25, Judge Butzner commented that 5 U.S.C. § 552(c) provides that the Act " 'does not authorize withholding of information or limit the availability of records to the public, except as specifically stated' " and noted Professor Davis' emphasis upon " '[t]he pull of the word "specifically". . . .' " K. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 783 (1967).

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[6] S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), hereinafter cited as Senate Report. House Report at 5.

The Court below granted the Government's motion to dismiss, not its motion for summary judgment. Thus, it seemingly accorded no weight to the affidavit of Agent Williams.[7] But even if that affidavit is given full consideration, it is a document which is most general and conclusory and which in no way explains *how* the disclosure of the records sought is likely to reveal the identity of confidential informants, or to subject persons to blackmail, or to disclose the names of criminal suspects, or in any other way to hinder F.B.I. efficiency.[8] The conclusion that the disclosure Weisberg seeks will cause any of those harms is neither compelled nor readily apparent, and therefore does not satisfy the Department's burden of proving under 5 U.S.C. § 552(b)

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[7] Weisberg contends that certain parts of the Williams' affidavit do not qualify for consideration under Federal Civil Rule 56. Those contentions, on remand, should, if Weisberg desires, be brought to the attention of the District Court.

[8] An F.B.I. investigatory file may generally relate to organized or other crime and may not have been originally intended for use in the prosecution of any named individuals, or, even if so originally intended, may no longer be intended for such use. The data contained in such a file may, however, require the protection of secrecy so as not to dry up future sources of information or to pose a danger to the persons who supplied the information or to prevent invasion of personal privacy. 5 U.S.C. § 552(b)(7) would appear sufficiently flexible to include within its protection such an investigatory file when and if such protection is required. Frankel v. Securities & Exchange Commission, 460 F.2d 813 (2d Cir. 1972); Evans v. Department of Transportation, 446 F.2d 821, 823-24 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Calif. 1971). In such instances, *in camera* inspection by the District Court might be appropriate. See discussion *infra* at n.[11].

(7), as the Department must, some basis for fearing such harm.[9] Neither the F.B.I. nor any other governmental agency can shoulder that burden by simply stating as a matter of fact that it has so done, or by simply labelling as investigatory a file which it neither intends to use, nor contemplates making use of, in the future for law enforcement purposes, at

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[9] "The burden of proof is placed upon the agency which is the only party able to justify the withholding." House Report at 9. *And see* the specific wording of 5 U.S.C. § 552(a)(3) . . . . While it may be that the introductory words of Section 552(b) make the burden of proof provisions of Section 552(a)(3) inapplicable in determining whether the Section 552(b) exceptions apply (*but see* the contrary approach taken in all opinions, majority, concurring and dissenting, in Environmental Protection Agency, et al. v. Mink, et al., —— U.S. —— (Januuary 22, 1973), and the Ninth Circuit's seeming assumption to the contrary in Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970)), that contention in no way compels any different conclusions than those expressed in this opinion. The underlying philosophy of Section 552 favors disclosure. *See* Senate Report at 3. Section 552(c) provides that Section 552 "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." *See* the decision *supra* at pp. 7-8 re Wellford v. Hardin, *supra*. The thrust of Section 552(c) is that exceptions from the disclosure provisions of Section 552 are to be carefully construed. *See* House Report at 11; Senate Report at 10. To place the burden of proof on the plaintiff to prove the nonapplicability of a Section 552(b) exception when the Government as a rule has knowledge of nearly all the facts relevant to such an exception would be contrary to the disclosure philosophy of all of Section 552 and specifically of Section 552(c). Moreover, placing the burden of proof on the plaintiff would also seemingly run contrary to the underlying philosophy set forth in the House Report which, in explaining why the burden of proof was placed on the agency to justify the withholding of information in Section 552(a)(3), stated (at 9): "A private citizen cannot be asked to prove that an agency has withheld information improperly because he

> least not without establishing the nature of some harm which is likely to result from public disclosure of the file. Something more than mere edict or labelling is required if the Freedom of Information Act is to accomplish its "primary purpose, i.e., 'to increase the citizen's access to government records.'" [10]

The above was, of course, written in the context of the facts of this case. In most cases perhaps, the Government may satisfy its burden of proof simply by establishing that the information sought was compiled for investigatory purposes and rests in an investigatory file, none of the contents of which have ever been made public. But that is not the case here.

I continue to agree with Judge Kaufman that the purpose of the Act should not be defeated if there is available a judicial technique for advancing it and at the same time ensuring that no harm comes to the interests Congress intended to protect. *In camera* inspection, as re-

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will not know the reasons for the agency action." *See also* Senate Report at 8. That same reasoning would seem equally applicable in determining the relationship among 552(a)(3), 552(b)(7) and 552(c).

* * * *

[10] Getman v. N.L.R.B., 450 F.2d *supra* at 672, in which Judge Wright quoted from Judge Bazelon's opinion in *Bristol-Myers*. *See* Philadelphia Newspapers, Inc. v. Department of H & U.D., 343 F. Supp. 1176, 1180 (E.D. Pa. 1972); Cowles Communications, Inc. v. Department of Justice, *supra* at 727.

"For the great majority of different records, the public as a whole has a right to know *what its Government is doing*" (emphasis supplied), Senate Report at 5-6. And *see also* the "conclusion" in House Report at 12: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating. * * *"

quired by the remand order of the withdrawn opinion, is such a technique. The fact that, in *Mink*, the Supreme Court determined that the language and legislative history of the Section (b) (1) exemption did not permit the use of *in camera* inspection does not mean that the technique is unsuitable in every case involving the Section (b) (7) exemption.[11] Indeed, its use seems most suitable in this case. Without it, the public will have to rely entirely upon the Justice Department's opinion that "[t]he results of the spectrographic tests are *adequately* shown in the report of the Warren Commission. . . ." [12] I suggest that Congress, in enacting the Freedom of Information Act, did not intend that the public would so have to rely.

Accordingly, I dissent, and continue to adhere to the views on this issue expressed by Judge Kaufman in his majority opinion for the panel.

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[11] As Judge Kaufman observed in note 8 of the withdrawn opinion,

> [I]n this case no Executive order, and no matter of national defense or foreign policy, is asserted to be involved. Further, it is to be noted that in remanding in connection with the application of 5 U.S.C. § 552(b) (5) exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", Mr. Justice White in the *Environmental Protection Agency* case placed the burden of showing entitlement to the (b) (5) exemption upon the Government.

[12] Emphasis supplied.

APPENDIX C

I, Marion E. Williams, a Special Agent of the Federal Bureau of Investigation, being duly sworn depose as follows:

1. I am an official of the FBI Laboratory and as such I have official access to FBI records.

2. I have reviewed the FBI Laboratory examinations referred to in the suit entitled "Harold Weisberg v. Department of Justice USDC D. C., Civil Action No. 2301-70," and more specifically, the spectrographic examinations of bullet fragments recovered during the investigation of the assassination of President John F. Kennedy and referred to in paragraphs 6 and 17 of the complaint in said case.

3. These spectrographic examinations were conducted for law enforcement purposes as a part of the FBI investigation into the assassination. The details of these examinations constitute a part of the investigative file, which was compiled for law enforcement purposes and is maintained by the Federal Bureau of Investigation concerning the investigation of the assassination of President John F. Kennedy.

4. The investigative file referred to in paragraph "3" above was compiled solely for the official use of U.S. Government personnel. This file is not disclosed by the Federal Bureau of Investigation to persons other than U.S. Government employees on a "need-to-know" basis.

5. The release of raw data from such investigative files to any and all persons who request them would

seriously interfere with the efficient operation of the FBI and with the proper discharge of its important law enforcement responsibilities, since it would open the door to unwarranted invasions of privacy and other possible abuses by persons seeking information from such files. It could lead, for example, to exposure of confidential informants; the disclosure out of context of the names of innocent parties, such as witnesses; the disclosure of the names of suspected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage. Acquiescence to the Plaintiff's request in instant litigation would create a highly dangerous precedent in this regard.

SIGNED /s/ Marion E. Williams

Washington
District of Columbia

Before me this 20th day of August, 19 70, Deponent Marion E. Williams has appeared and signed this affidavit first having sworn that the statements made therein are true.

My commission expires August 14, 1973.

/s/ Louise D. Walter
Notary Public in and for the
District of Columbia

APR 30 1974

MICHAEL RODAK, JR., CLERK

No. 73-1138

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WEISBERG, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. B) is reported at 489 F. 2d 1195. The vacated opinion of the panel of the court of appeals (Pet. App. A) is not reported. The district court issued no opinion.

JURISDICTION

The *en banc* judgment of the court of appeals was entered on October 24, 1973. The petition for a writ of certiorari was filed on January 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record in this case establishes that the documents sought by petitioner pursuant to the Freedom of Information Act may be withheld from disclosure as part of an investigatory file compiled for law enforcement purposes.

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a)(3) * * * each agency, on request for identifiable records * * * shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides * * * or in which the agency records are situated has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. * * *
>
> (b) This section does not apply to matters that are:
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; * * *.

STATEMENT

This suit was brought under the Freedom of Information Act, 5 U.S.C. 552, to compel the Department of Justice to disclose a portion of the file compiled by

the FBI in the course of its investigation of the assassination of President John F. Kennedy. The specific records sought consisted of the results of FBI spectrographic analyses of varied bullets, garments, bullet fragments, and other objects connected with the assassination (Pet. App. B–2, B–3).

Petitioner first requested the records from the Department of Justice. His request was denied by the Deputy Attorney General and the Attorney General, on the ground that the records sought were part of an investigatory file compiled for law enforcement purposes and thus exempt from compelled disclosure under Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7). Petitioner then filed suit in the district court seeking production of the records under the Freedom of Information Act (Pet. App. B–2, B–3). The government moved to dismiss, or in the alternative, for summary judgment. This motion was subsequently supplemented by the affidavit of an FBI Special Agent who had reviewed the records in question and attested that the "spectrographic examinations were conducted for law enforcement purposes as a part of the FBI investigation into the assassination" (Pet. App. C–1). After petitioner failed to file any counter-affidavit, the district court granted the motion to dismiss (Pet. App. B–3).

A divided three-judge panel of the court of appeals reversed and remanded the case to the district court, holding that Exemption 7 applies "only when the withholding agency sustains the burden of proving that disclosure of the files sought is likely to create a concrete prospect of serious harm to its law enforce-

ment efficiency either in a named case or otherwise" (Pet. App. A–8). The panel opinion, however, was vacated by the court of appeals when it ordered a rehearing *en banc* (Pet. App. B–3, n. 2).

After rehearing the case *en banc* the court of appeals, over a single dissent,[1] affirmed the district court's judgment. Judge Danaher's opinion for the court stated (Pet. App. B–3):

> We are satisfied that the record before us clearly demonstrates the desired materials were part of the investigatory files compiled by the FBI for law enforcement purposes, and, as such, are exempt from the disclosure sought to be compelled. [Footnote omitted.]

The court concluded (Pet. App. B–15):

> Here the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were "investigatory files compiled for law enforcement purposes." When the District Judge made that determination, he correctly perceived that his duty in achieving the will of Congress under the Freedom of Information Act was at an end.

ARGUMENT

The decision of the court of appeals is plainly correct. Accordingly, since there is no conflict of deci-

[1] The three-judge panel of the court of appeals consisted of Judge Danaher, who dissented, Chief Judge Bazelon, and District Judge Frank A. Kaufman. Pursuant to 28 U.S.C. 46(c), Judge Kaufman did not participate in the *en banc* rehearing, and only Chief Judge Bazelon dissented from the *en banc* decision for the reasons stated in the panel's vacated opinion.

sions, further review by this Court is not warranted.

The court of appeals properly concluded that the record in this case established that the records at issue were part of an investigatory file compiled by the FBI for law enforcement purposes. The record contained the uncontradicted affidavit of an FBI Special Agent who had reviewed the records in question and attested that they were compiled by the FBI during the course of its investigation of the assassination of President Kennedy (Pet. App. C–1). This investigatory file was clearly compiled for "law enforcement purposes" since, as the court below concluded (Pet. App. B–3 to B–6, B–10), the FBI was acting pursuant to its law enforcement functions when it compiled these records to assist in determining the assassin of the President of the United States.

Since the records sought here are part of an investigatory file compiled for law enforcement purposes, the court of appeals correctly concluded that the records are exempt from compelled disclosure by Exemption 7, which protects "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. 552 (b)(7). Petitioner's contention that Exemption 7 requires a "showing how disclosure of the records sought would harm the government's law enforcement functions or proceedings" (Pet. 2) finds no support in the language or legislative history of Exemption 7.

Exemption 7 was designed to preserve the ability of the government to perform its law enforcement functions effectively. Congress clearly recognized that this purpose could not be satisfied if members of the

public were authorized to compel disclosure of whatever items in investigatory files appeared to be of interest except as the government could prove that disclosure would produce specifically identifiable harm. As the court of appeals noted with respect to FBI files, "[w]e need only surmise the consequences to law enforcement if any 'person', knowing full well that an investigation has been conducted, can ask some federal court to compel disclosure of the Bureau's files. * * * We have no doubt whatever that Congress was fully alive to the problem where investigatory files of the FBI were involved" (Pet. App. B–11 to B–12).[2]

Contrary to petitioner's contention (Pet. 9–12), there is no conflict of decisions. While courts of appeals have analyzed the types of harm, such as disclosure of informants or investigative techniques,

[2] The Senate Report stated (S. Rep. No. 813, 89th Cong., 1st Sess. 3):

"It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation."

Similarly, the House report indicated an intent to "cover material such as the Federal Bureau of Investigation files which are not now protected by law." H. Rep. No. 1497, 89th Cong., 2d Sess. 2. The pertinent congressional debates similarly indicate a congressional intent to provide broad protection to "investigatory files" with the limited exception embodied in the clause, discussed *infra*, pp. 7–8, "except to the extent available by law to a party other than an agency." 110 Cong. Rec. 17667–17668. See also S. Rep. No. 1219, 88th Cong., 2d Sess. 8, 14.

The court of appeals further noted, however, that the Department of Justice has issued regulations under which, in the exercise of administrative discretion, investigatory files which are more than fifteen years old may be released to persons engaged in historical research (Pet. App. B–8, n.*).

that might result from the disclosure of investigatory files,[3] until the panel below issued its now-vacated decision no court of appeals had ever held, or even stated, that Exemption 7 contains the additional requirement of a specific showing of harm which petitioner seeks to read into the Act. It is noteworthy that no conflict of decisions was asserted by Chief Judge Bazelon in his dissenting opinion.

There is no merit to petitioner's contention that he is entitled to the records in question by virtue of the "except" clause in Exemption 7—"except to the extent available by law to a party other than an agency" (Pet. 17–18). The legislative history of Exemption 7 clearly shows that this exception was designed solely to insure that private litigating parties to whom material in an investigatory file is otherwise available by law do not lose that right by virtue of Exemption 7, *e.g.*, an individual who is entitled under the Jencks Act to see an FBI report. 110 Cong. Rec. 17667–17668. However, Exemption 7 "is not intended to give a private party indirectly any earlier or

[3] See *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813 (C.A. 2), certiorari denied, 409 U.S. 889, and *Evans* v. *Department of Transportation*, 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918, both of which held Exemption 7 applicable to the records at issue there. In *Wellford* v. *Hardin*, 444 F. 2d 21 (C.A. 4), the records were not covered by Exemption 7 since they were found to be "no more than the results" of "administrative action taken to enforce the law" (444 F. 2d at 24–25).

The court of appeals below, sitting *en banc*, also found no conflict with its prior decisions. Of course, a conflict between circuits would not be presented even if the court of appeals had decided to overrule its earlier decisions. Thus, petitioner's additional reliance upon "the District of Columbia Circuit's own prior decisions" (Pet. 10) is misplaced.

greater access to investigatory files than he would have directly in such litigation or proceedings." H. Rep. No. 1497, 89th Cong., 2d Sess. 11. See *Barceloneta Shoe Corp.* v. *Compton,* 271 F. Supp. 591, 593–594 (D. P.R.). See also *Clement Brothers Co.* v. *National Labor Relations Board,* 282 F. Supp. 540, 542 (N.D. Ga.); *Benson* v. *United States,* 309 F. Supp. 1144 (D. Neb.). Thus, in the instant case, the court below correctly held that the "except" clause in Exemption 7 is not applicable to petitioner (Pet. App. B–15, n. 15). The now-vacated panel opinion, in which Chief Judge Bazelon concurred, similarly concluded that the "except" clause "is not applicable herein since Weisberg is not entitled to the information he seeks as a party to any action other than the within suit. Whether the word 'party', as used in 5 U.S.C. § 552(b)(7), includes someone other than * * * the particular party seeking the information, raises a question which this court need not resolve herein because the record does not indicate that any other person has received or is entitled to receive under any law other than the Freedom of Information Act, or under any discovery rule, the information Weisberg seeks herein" (Pet. App. A–3, n. 3; citations omitted).

Finally, there is no merit in petitioner's assertion that the court below has held that an agency can meet its burden of establishing the applicability of Exemption 7 "by mere edict" and that "[t]he role of the

court is thus reduced to that of a rubber stamp" (Pet. 10, 14). The opinion of the court of appeals emphasizes that the agency's "*ipse dixit* does not finalize the matter, for there remains the judicial function of determining whether that classification be proper" (Pet. App. B–14). Contrary to petitioner's assertion (Pet. 16), the court of appeals did not treat Exemption 7 "in the same manner" as this Court treated Exemptions 1 and 5 in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73. The court below clearly stated that Exemption 7, no less than Exemption 5, 5 U.S.C. 552(b)(5), is strikingly different from Exemption 1, and that the application of Exemption 7 "will turn ultimately upon a determination by the district court that disclosure is not required—as in the instant case" (Pet. App. B–14; footnote omitted). The court of appeals was also "satisfied that the record before us clearly demonstrates the desired materials were part of the investigatory files compiled by the FBI for law enforcement purposes" (Pet. App. B–3; footnote omitted), and that "the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were 'investigatory files compiled for law enforcement purposes'" (Pet. App. B–15).[4]

[4] The court of appeals also concluded (Pet. App. B–14, n. 14) that the record in this case was sufficient to meet the standards of proof established in its earlier decision in *Vaughn* v. *Rosen*, 484 F. 2d 820, certiorari denied, March 18, 1974, No. 73–1107, upon which petitioner relies (Pet. 19–20).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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